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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-175 (consolidated with No. 74-5176)

J. WILLIAM MIDDENDORF, II, *et al., etc.*,
Petitioner,

v.

DANIEL EDWARD HENRY, *et al., etc.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

JURISDICTION

This Court granted motion of petitioners in No. 74-5176 (*Henry, et al., v. Middendorf, et al.*) for leave to proceed *in forma pauperis* on October 21, 1974. Upon granting the respective petitions for writs of certiorari filed by said petitioners in No. 74-5176 and by the federal parties in No. 74-175 on said date,

the Court consolidated the cases without specifying whether only one of the parties was to file a brief as petitioner.[1]

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions, as interpreted and applied in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial.

2. Whether the Fifth Amendment's guarantee of due process of law requires the military services to appoint counsel, who does not represent the prosecution, to assist the accused in every trial before a summary court-martial in which a sentence of confinement is imposed.

3. Whether a federal district court may, by writ of *mandamus* or *habeas corpus*, extend the scope of its

[1]In accordance with the agreement of the parties indicated in Brief For The Federal Parties, footnote 2, p. 2, the latter have filed their opening brief discussing the issues raised in both petitions. The parties designated as "plaintiffs" in said footnote (Respondents in this brief) have also previously filed an opening brief as "Petitioners" in No. 74-5176 in accordance with their reserved rights. The latter discussed only the issues raised in their own petition. This brief constitutes a respondents' brief in No. 74-175, in which for the sake of uniformity the respondents are referred to as "plaintiffs". Either party may yet file a reply brief.

judgment beyond the territorial limits of its district under the provisions of 28 U.S.C. 1391(e).[2]

STATEMENT

The Brief for Petitioners (No. 74-5176) heretofore filed contains a Statement of the Case on which plaintiffs rely. The Statement of the federal parties, Brief, p. 3, is also acceptable to plaintiffs if corrected as follows:

There were not "numerous intervenors" as plaintiffs who had been ordered to stand trial at summary courts-martial which had not yet convened at the time the complaint was filed. Brief for the Federal Parties, p. 4. Actually, there were only two named intervenors,

[2]The federal parties in their opening brief, footnote 3, p. 3, assert that this question need not be addressed by this Court, citing *Parker v. Levy*, No. 73-206, decided June 19, 1974, slip op. 27, (417 U.S. 733, 94 S.Ct. 2547 at 2564). There is no indication that the "alternative attacks" mentioned in *Parker* related to jurisdiction of the District Court. Part III of Brief for Petitioners (No. 74-5176) pp. 31-38, makes the point that the question of jurisdiction is properly raised at any stage of judicial proceedings. Further, the question here does have "practical significance", because the scope of effectiveness of the District Court's judgment, orders and writs requires determination if this Court grants the relief requested by plaintiffs. As this question was not discussed further in the federal parties' opening brief, no additional argument is deemed necessary on the question in this brief, other than to point to the comment of Mr. Justice Frankfurter in *Burns v. Wilson*, 346 U.S. 844 at 851-52: "We should not permit a question of jurisdiction as far-reaching as this one to go by concession, or decide it sub silentio."

BRAY, II, and NESS, who were both convicted by summary courts-martial and sentenced to confinement at hard labor. The three named plaintiffs who had been ordered to stand trial at summary courts-martial which had not yet convened were HAECKER, JACKSON and MIMS. *Id.* footnote 5, p. 4.

With regard to the latter, the federal parties in footnote 6, p. 4 of their opening brief contend that the District Court did not acquire jurisdiction over the claims of these plaintiffs, relying on the argument in the government's Supplementary Brief in *Secretary of the Navy v. Avrech*, No. 72-1713 (94 S.Ct. 3039 (1974)). Nowhere below did the federal parties raise this question of jurisdiction. This Court in *Avrech* directed counsel to file supplemental briefs on the issues of the jurisdiction of the District Court but then left "to a future case the resolution of the jurisdictional issue". 94 S.Ct. at 3040. It appears that the same or related jurisdictional question is raised in another case currently before this Court, *McLucas, Secretary of the Air Force v. DeChamplain*, No. 73-1346, in which briefs have been submitted; the government relies there also on its *Avrech* brief on the jurisdictional issue. If the Court deems that issue properly raised herein, plaintiffs here rely on the Supplemental Brief for Appellee filed in *Avrech* and the pertinent portions of the Brief for Appellee filed in *McLucas*.

With reference to Section 2 of the federal parties' Statement, Brief, p. 5, it should be noted that in its Memorandum Opinion (Pet. App. 4a, 357 F.Supp. 495),[3] the District Court in this case viewed the

[3]"Pet. App." designates the appendix to the federal parties' petition for a writ of certiorari. (No. 74-175).

requirement for assistance of counsel as enunciated by *Argersinger v. Hamlin*, 407 U.S. 25 (1972) to be grounded not only in the Sixth Amendment but also in the constitutional due process clauses. Judge Williams stated, 357 F. Supp. at 503, that he incorporated by reference the "well-reasoned" *Daigle* opinion's discussion regarding the applicability of Argersinger to summary courts-martial proceedings. Judge Pence in *Daigle v. Warner*, 348 F. Supp. 1074, 1080 (D. Haw. 1972) held:

> "Whether considered in terms of *due process or the Sixth Amendment right to counsel*, this court holds that the type and quality of representation which must be provided under *Argersinger* to summary courts-martial perforce may vary with the context of each particular case." (Emphasis added).

In the appeal of *Daigle*, the Ninth Circuit court ruled, 490 F.2d 358, (Pet. App. 26a) that the Sixth Amendment's guarantee of counsel is not applicable to trials before summary courts-martial, but that the Fifth Amendment's guarantee of due process of law requires counsel to be made available to accused at summary courts-martial under some circumstances.

The order of the Ninty Circuit panel in this case 493 F.2d 1231, (Pet. App. 1a-2a), issued "under the compulsion" of the *Daigle* opinion, states that:

> "Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts-martial, without the limitations placed upon that right by the majority of the *Daigle* panel."

Thus, the status of the case before this Court raises the issue as to whether the right to counsel provision of the Sixth Amendment per se (*Argersinger v. Hamlin*, supra), or that right as derived from the due process clause of the Fifth Amendment, or both, are applicable to summary courts-martial.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' opening brief (Brief for Petitioners, No. 74-5176) necessarily was directed to the ruling of the Ninth Circuit in *Daigle*, as explained in Part I of its Argument. Specifically, plaintiffs contend, contrary to the holding in *Daigle*, that the Sixth Amendment guarantee of assistance of counsel applies to all summary courts-martial, and that the Fifth Amendment's due process of law clause, as interpreted by this Court in *Argersinger* to require defense counsel in criminal prosecutions where imprisonment is imposed, also applies to all summary courts-martial without the limitations placed upon that right by the *Daigle* holding. Plaintiffs' position is supported by the United States Court of Military Appeals, *United States v. Alderman*, 22 USCMA 298 (1973), the Fifth Circuit, *Betonie v. Sizemore*, 496 F.2d 1001 (1974), and the two-judge majority of the Ninth Circuit panel in the instant case, 493 F.2d 1231 (1974), Pet. App. 1a-2a, which followed *Daigle* "under . . . compulsion".

The position of the Navy and the Marine Corps,[4]

[4] In this brief, references to the Navy include the Marine Corps, except where otherwise indicated.

that there is no constitutional requirement whatsoever for defense counsel at summary courts-martial, has been refuted by every court in which the question has been raised, including the Ninth Circuit Court of Appeals, and appears not to have the support of the other military services, the Army and the Air Force.

The federal parties in their opening brief, however, present the same argument to this Court, as they have throughout the proceedings before the United States Court of Military Appeals in *Alderman*, the Fifth Circuit in *Betonie*, and the Ninth Circuit in *Daigle* and this case, that because of "military necessity" any such constitutional right should be judicially determined to be inapplicable. Again, all of those courts unanimously found that the Navy has failed to prove that such military necessity exists as to justify complete denial of this vital constitutional safeguard.

The federal parties ask this Court to refrain from interfering with a "detailed plan devised by Congress to administer military justice." Brief, p. 9. But in fact there is no congressional "plan" that *prohibits* either the appointment of defense counsel by the government or the retention of defense counsel by the accused himself at summary courts-martial. Plaintiffs do not challenge the constitutionality of any provision of the Uniform Code of Military Justice ("UCMJ"), as in *Parker v. Levy*, supra, to which the federal parties make frequent references in their Brief. On that ground, *Parker v. Levy* is inapposite.

It is the *failure* to provide military defense counsel at summary courts-martial to an accused who cannot afford to retain his own counsel, without requiring that the accused risk potentially greater punishment by

standing trial instead at a special or general court-martial, that is the subject of plaintiffs' constitutional challenge. Lack of sufficiently significant military necessity makes such failure an unconstitutional deprivation when conviction results in confinement, under the precept of *Argersinger*, in the view of the Court of Military Appeals and the Fifth Circuit.

The Ninth Circuit in *Daigle* held that the Sixth Amendment was not intended to apply to trials before courts-martial. Plaintiff's opening brief, Part I, Sections C, D, and E, refutes that position, and more on this point is offered here in response to the federal parties' pertinent argument in their opening brief.

Correctly ruling that "courts-martial are required to afford an accused due process of law", the Ninth Circuit in *Daigle*, 490 F.2d at 364, proceeded erroneously to analogize summary courts-martial to parole and probation revocation proceedings, with a resulting holding of limited due process rights to defense counsel. Part II of plaintiff's opening brief points to the deficiency of this view and calls for this Court's "absolute standard" of due process with regard to the right of counsel in criminal prosecutions. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Navy's view of military due process, as expressed in the federal parties' brief, would eliminate even the limited application of right to counsel as enunciated in *Daigle*, leaving military personnel with not even the degree of such right that this Court has afforded to probationers and prison convicts. *Gagnon v. Scarpelli*, 411 U.S. 778, (1974) and *Wolff v. McDonnell*, 418 U.S. 539, (1974).

Despite all of the strained argument of the federal parties to the contrary, summary courts-martial are formalized one-officer criminal prosecutions in which the judge serves also as the prosecutor, and the accused, unless he has retained defense counsel at his own expense, is not represented by counsel who does not also represent the prosecution. As no military necessity has been proven for such trial proceedings, when confinement results from conviction and lifetime economic disability may accrue from such record, all logic defies a finding of "fairness" and any due process of law, military or otherwise.

The federal parties present argument that consent to trial by summary court-martial constitutes a valid waiver of the right to counsel. Brief, p. 10 and pp. 43-49. This question was not considered by the court of appeals in *Daigle* or the instant case, and need not now be addressed by this Court, cf. *Parker v. Levy*, supra, 94 S.Ct. at 2564. In any event, as the Fifth Circuit Court of Appeals remarked in *Betonie*, 496 F.2d at 1006, "we think that reliance on these arguments would be futile", citing *United States v. Jackson*, 390 U.S. 570 (1968) and *Rice v. Olson*, 324 U.S. 786 (1945). No later decision of this Court has altered the basic precept of *Jackson* stated at p. 582: "Whatever might be said of Congress' objectives, they cannot be pursued by means that *needlessly* chill the exercise of basic constitutional rights." (Emphasis added).

The federal parties also raise the question as to whether any requirement for appointment of defense counsel at summary courts-martial should be made to apply retroactively. Brief, p. 10 and pp. 49-58. This issue was never raised by any party at any stage of the

proceedings below in *Daigle* or the instant case, and it was not considered by the court of appeals in either case. Accordingly, it, too, need not now be addressed by this Court, cf. *Parker v. Levy*, supra, slip op. 27. In any event, the rights of these plaintiffs and members of their class do not depend on retroactivity, as their action was brought *after* the decision of this Court in *Argersinger* on June 16, 1972. If this Court deems the question to have been properly raised under the factual context of this case and that it should be determined at this time, it is clear that a requirement for defense counsel must be applied retroactively, as this Court has consistently held in previous decisions.

ARGUMENT

I.

THERE IS NO OVERRIDING MILITARY NECESSITY THAT JUSTIFIES A HOLDING OF INAPPLICABILITY OF THE ARGERSINGER RULE TO SUMMARY COURTS

The federal parties' brief quotes frequently from this Court's recent opinion in *Parker v. Levy*, 94 S.Ct. 2547 (1974), apparently to establish support for its position that "Such a procedure (pre-*Argersinger* summary courts-martial) is essential to the military...". Brief, p. 15. But *Parker*, involving application of First Amendment principles, has no direct bearing with regard to the Sixth and Fifth Amendment right to counsel issue in this case. This Court's discussion there

of the differences between military and civilian "communities", while perhaps relevant, is by no means controlling in this case. Plaintiffs here, unlike that in *Parker*, do not challenge the constitutionality of any provision of the Uniform Code of Military Justice. ("UCMJ").

The key question here is whether the Navy has borne the burden of proof that military necessity exists for such court-martial procedure which this Court in *Argersinger* held to be unconstitutional in a civilian setting.[5]

The posture of the issue (in a different factual context) was well stated by the District Court for the District of Columbia in January, 1974:

> "The doctrine of military necessity does not embrace everything the military may consider desirable. One does not automatically forfeit the protections of the Constitution when he enters the military service. The constitutional rights of a G.I. . . . may not be infringed except to the extent that the military can demonstrate by concrete proof an urgent necessity to act unconstitutionally in order to preserve a significant aspect of discipline or morale." *Committee for G.I. Rights v. Schlessinger*, 370 F.Supp. 934 at 940.

See *United States v. Tempia*, 16 USCMA 629 (1967); *United States v. Jacoby*, 11 USCMA 428 (1960);

[5]Nothing in *Argersinger* suggests that it is inapplicable to the military. The UCMJ has "by decision and practice" incorporated the Sixth Amendment right to counsel and "afforded its protection to the members of the Armed Forces." Cf. *Schick v. Reed*, No. 73-5677, decided December 23, 1974, dissenting opinion of Mr. Justice Marshall, footnote 5, 43 Law Week 4083 at 4088.

Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969).

Nothing in *Parker* undermines the position taken by all of the courts which thus far have considered the question of "military necessity," as related to the constitutional right of counsel. They have all recognized the factor of "military necessity" but each, with good reason, has found failure on the part of the Navy to carry its burden of proof.

The first federal court to consider the question since the decision in *Argersinger*, the District Court for the District of Hawaii, discussed at length the matter of "military necessity" in *Daigle v. Warner*, 348 F Supp at 1080-81:

> "The government's primary argument is that the peculiar needs of the military demand that the *Argersinger* requirements not be applied to summary courts-martial. This court recognizes
>
> > 'that a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants is necessary to an effective national defense establishment, few would deny.' *O'Callahan v. Parker*, 395 U.S. 258, 265, 89 S. Ct. 1683, 1687, 23 L Ed 2d 291.
>
> "However, as noted above, these special attributes of military justice cannot justify denial of basic constitutional rights, when *both these rights and the needs of the military can be successfully accommodated*. By applying *Argersinger* to summary courts-martial, this court is not burdening the military with an inflexible and impossible requirement.[14] Whether considered in terms of due process or the Sixth Amendment right to counsel, this court holds that the type and quality of representation which must be provided under *Argersinger* to summary courts-martial perforce may vary with the context of each particular case.[15]
>
> "On Oahu are two large military bases with no apparent lack of qualified lawyers to undertake the *Argersinger* requirements. With this type of representation available, it would be a violation of *Argersinger* to provide something less to servicemen tried at those bases. *The "ship-at-sea" hypothetical which the government has so often cited presents a very different situation.* Whenever, due to the exigencies of service operations, qualified lawyers are not present, the Navy and Marine Corps are mandated by *Argersinger* only to *provide the best counseling then available*.[16] * * * While the services must make a good faith effort to provide trained lawyers in all cases, this court reemphasizes that due to the special operative requirements facing the armed services, the type and quality of representation must perforce vary with the circumstances of each case. It is only in this way that rational and constitutional accommodation of any conflicting interest can be made." (Footnotes omitted; emphasis added.)

Adopting that view of District Judge Pence in *Daigle*, Judge Williams of the District Court for the Central District Court of California in the instant case, *Henry v. Warner*, 357 F Supp at 503-4, declared: "Further, I reject the Government's arguments that the peculiar needs of the military demand that *Argersinger* requirements not be applied to summary courts-martial."

The Ninth Circuit panel in *Daigle* also agreed with this view of "military necessity" as seen by Judge Pence, holding that there is "scant support" in the

record for the Navy's argument "that naval discipline will suffer severely if appointed counsel are required." 490 F.2d at 366. The Ninth Circuit opinion pointed out that the Army and Air Force already provide counsel to all accused before summary courts-martial, and that the Navy "allows private retained counsel to participate in such proceedings."[6]

It should be noted also that the Navy *has provided* defense counsel in summary courts-martial since June 8, 1973, following the decision by the United States Court of Military Appeals in *Alderman*, supra, on May 25, 1973. Federal parties' Brief, note 18, p. 18.

The Fifth Circuit also addressed itself directly to the issue of "military necessity" in *Betonie*, 496 F.2d at 1007, and found that "We have been pointed to no convincing reason" for denying *Argersinger* application to "military proceedings". That court also found "[P]articularly significant" the fact that "both the Army and the Air Force have already begun to apply *Argersinger* in all court-martial proceedings". *Id* at 1007.

As for the United States Court of Military Appeals, which the federal parties in their Brief, p. 34, concede "is an agency with expertise in problems of military justice", the decision in *Alderman* supplies that court's view on the pertinent question of "military necessity". Specifically, Judge Duncan's concurring opinion, 22 USCMA at 303 states:

[6]See note 17, p. 576, Fidell, *The Summary Court-Martial: A Proposal*, 8 Harv. J. L. 571 (1971) ("Fidell"). See also federal parties' Brief, note 14, p. 14, and Byrne, *Military Law, A Handbook for the Navy and Marine Corps*, Par. 706, p. 110. ("Military Law").

> "The record contains no evidence which convinces me that application of the *Argersinger* rule should not be followed in our system because of military necessity."

However, the federal parties, id. p. 34, gratuitously claim that the majority opinion in *Alderman* did not consider the "special circumstances of the military" in rendering its decision.

To refute that claim, and all of the federal parties' argument as to "military necessity" made to this Court in this case, plaintiffs here present that portion of the "Brief On Behalf Of Appellant" filed with the United States Court of Miliary Appeals in *Alderman* (Docket No. 26,342) by the following Appellate Defense Counsel, Office of the Judge Advocate General of the Navy: THOMAS M. GEISLER, JR, Lieutenant, JAGC, USNR; D. A. HIGLEY, Captain, USMC; DAVID C. SELLERGREN, Lieutenant, JAGC, USNR; and GEORGE W. POWELL, Commander, JAGC, USN.

Since the identical argument as to "military necessity" was made to the Court of Military Appeals in *Alderman*, as here, the refutation of that argument by Navy attorneys seems particularly significant and for that reason is incorporated herein as part of plaintiffs' brief, as follows:

> "(3) *There is no Overriding Military Necessity Which Might Arguably Preclude Application of Argersinger v. Hamlin*
>
> "The Government has argued in its brief in a case similar to the case at bar[44] that some overriding military necessity precludes application of ARGER-

"[44] United States v. O'Brien, *supra*, at note 22.

SINGER in the military. (The Army and Air Forces seem not to have perceived any such overriding military necessity, in view of their voluntary compliance with ARGERSINGER; . . .) The Government has also argued that in enacting Article 20 of the Uniform Code of Military Justice, Congress has already in effect made a finding of military necessity such that ARGERSINGER should not be applied. (This argument is somewhat impaired by the fact that Article 20 was drafted before the Supreme Court's decision in ARGERSINGER). Appellant respectfully urges that this Honorable Court's determination that the Sixth Amendment right to counsel applies in the military means that the Constitutional rule in ARGERSINGER is binding, even were 'the requirements thereof . . . onerous to the military authorities.' (Opinion of Kilday, J., *United States v. Tempia, supra*, 16 USCMA at 641). However, were the issue of the applicability of the Sixth Amendment right to counsel being decided afresh, the same result would follow, inasmuch as there simply is no overriding military necessity which might arguably preclude application of ARGERSINGER to the military.

"It should first be emphasized that application of ARGERSINGER to military law does *not* mean abolition of the summary court-martial. Rather, ARGERSINGER merely requires that the accused be afforded a right in addition to the present statutory scheme for summary courts, and *that* only in those cases where the Government chooses to retain the option of deprivation of liberty. The full panoply of other punishments, which are quite varied in military law, are still available; these punishments include, for

example, forfeiture of pay, detention of pay, reduction in pay grade, and various degrees of reprimand.[45] Under the terms of ARGERSINGER, a summary court-martial without appointed counsel is not prohibited so long as deprivation of liberty is not threatened. Certainly it cannot be maintained that deprivation of liberty must be meted out in every summary court-martial case. Furthermore, even in those cases where the Government feels the option of deprivation of liberty should be preserved, all that is required is that the right to counsel be given the accused. The summary court-martial remains, just as the police court survives.[46]

"Thus, ARGERSINGER does not mean that Article 20 of the Code is unconstitutional any more than MIRANDA meant that Article 31 was unconstitutional. In TEMPIA, this Honorable Court applied MIRANDA and required that, at custodial interrogations, servicemen be given the right to appointed legal counsel

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"[45] Manual for Court-Martial, 1969 (Rev.), Paragraph 126.

"[46] In its brief in *United States v. O'Brien, supra*, the Government states:

> By the addition of counsel the summary court-martial would be transformed into the equivalent of a special court-martial, tried with judge alone, with reduced disciplinary authority. (Brief of Appellee, at 40).

This statement is, of course, quite incorrect. There is no requirement that the summary court-martial possess the qualifications of a military judge before a special or general court-martial. See Articles 26 and 27, Code, *supra*; . . . Consequently, a convening authority may continue to appoint non-lawyer summary court officers without violating Codal or Manual provisions.

and be specifically informed of that right. The Honorable Court thus merely added the MIRANDA right to the statutory provisions of Article 31. In JACOBY, this Honorable Court applied the Sixth Amendment right of confrontation to courts-martial and thus added the right of personal appearance at the taking of a deposition to the statutory provisions of Article 49. Similarly, appellant here merely urges that this Honorable Court add the Argersinger right to counsel to the statutory provisions of Article 20.

"ARGERSINGER prohibits only deprivation of liberty at a summary court-martial where the accused has not been afforded the right to counsel and does not affect the summary court-martial as an institution *per se*. It should be pointed out that even the institution of the summary court-martial *per se* has not been felt to be an overwhelming military necessity. The one officer summary court-martial does not pre-date the Constitution as a feature of military law; rather, it apparently first appeared in American military law in 1890.[47] W. Winthrop, Military Law and Precedents 493 (2d 3d. 1920). The American service departments, therefore, performed their judicial duties for over 100

"[47]Prior to 1904, the Navy was not authorized to conduct one officer courts-martial. In that year, Congress authorized 'deck courts', the Naval antecedent of the present day summary court-martial. Act of February 18, 1909, Ch. 131. Section 2, 35 Stat. 621. Congress further provided that 'in no case shall such courts adjudge discharge from the service or adjudge confinement of [sic.] forfeiture of pay for a longer period than twenty days'. 35 Stat. 621. Prior to the establishment of the 'deck courts', the Navy's lowest military court was the 'summary' court, composed of four (4) officers. See S. Rep. No. 743, 60th Cong., 2d Sess. (1909).

years without the aid of a summary court. Indeed, Winthrop reported on the "essentiality" of the summary court after observing that institution for three decades:

> While the institution of this court provides a ready and effective means of trial and punishment for minor offences, *it is yet not essential* that it should be resorted to in any case. . . . (Winthrop, *supra*, at 496)

So much of 'military necessity' in the eyes of Winthrop.

"Moreover, examination of the legislative history of the Navy 'deck court'[48] indicates that it was not adopted because Congress imagined there was any special 'military necessity.' Rather, the deck court and the Army summary court-martial were likened to the civilian police courts and deemed useful in the same fashion as the police courts:

> Judging from the practice of police courts of the country in dealing with misdemeanors and that of the army in trying lesser military offenses before a court consisting of a single officer, it is believed that the administration of justice will be prompted by the adoption of this system of trial in the navy.

S. Rep. No. 743, 60th Cong., 2d Sess. (1909) There is a vast distinction between utility and necessity.

"The analogy of summary courts-martial and police courts was reiterated when Congress enacted the Uniform Code of Military Justice. To an observation that counsel were not necessarily appointed in local city and municipal courts came the reply:

"[48]See preceding note.

> Mr. Elston. Of course, there is no provision in the military code for the appointment of counsel in summary court-martial cases, and the police court more or less corresponds to summary report. (sic). Con. Floor Debate on the Uniform Code of Military Justice, 146. See also page 138.

"That the summary court-martial survived the Military Justice Act of 1968 is no testimony to any overwhelming military necessity. Rather, as Senator Ervin remarked in the Senate debates on that act:

> Fourth, the committee inserted a new provision to amend article 20 of the Uniform Code of Military Justice to assure that a serviceman may not be tried over his objection by a summary court-martial, which consists of one commissioned officer and which affords literally no safeguards to the defendant. This amendment is a compromise between those who favor retention of the summary court as under present law and those including myself, who would abolish it. *This compromise is no expression of confidence in the summary court*, which I consider to be an inferior court in concept, procedure and in the quality of justice it dispenses. However, until eliminated from the court-martial structure, the amendment proposes merely to remove the present restriction on the existing right of servicemen to refuse trial by summary court.
> 114 Congressional Record, 90th Congress, S12027-12028 (Oct. 3, 1968).

"Therefore, it is respectfully urged that Congress has *not* in fact concluded that the institution of the summary court-martial is a matter of overriding military necessity, much less that the Constitutional right to

counsel of ARGERSINGER must not be applied because of overriding military necessity.

"Rather, Congress has indicated its great concern that court-martial accuseds be afforded counsel. In 1968, in fact, Congress by statute went beyond the contemporaneous understanding of the Sixth Amendment right to counsel, so great was its concern in this area. Thus, this Honorable Court had decided in CULP that, for *special* courts-martial, the then-provisions of the Code which permitted appointment of non-lawyer defense counsel did not conflict with the Sixth Amendment right to counsel. Congress concluded, however, that an accused at a special court-martial should receive even greater assistance and enacted the Military Justice Act of 1968, titled 'To increase the participation of military judges and counsel on courts-martial, and for other purposes.'

"By virtue of this Act, a bad conduct discharge cannot be awarded unless the accused had lawyer defense counsel, and in all other special courts-martial the accused is afforded the right to appointed lawyer defense counsel, except where prevented by physical conditions or military exigencies.[49] Further, even in cases of 'physical conditions or military exigencies', the convening authority is required to describe in writing the reasons why qualified counsel could not be obtained.[50]

"[49]Article 19 of the Code.

"[50]Article 27 of the Code.

"Moreover, during the floor debate in the House of this Act, Mr. King of New York said:[51]

> The bill provides for the right of defendants in special courts-martial, at their request, to be defended by free qualified legal counsel. While many civilian courts have been moving in the direction of requiring assigned counsel in misdemeanor cases, I feel that the American fighting man should not have to await court decisions for this valuable right. Who more than the soldier risking his life for his country is entitled to the best of legal safeguards when he is faced with a criminal charge?

"The belief of Congress that Supreme Court decisions regarding the right to counsel would be applied in the military is further indicated by remarks made during hearings on the bill to establish the Judge Advocate General's Corps of the Navy.[52] The framer of the bill in the House, the Honorable Charles E. Bennett of Florida, indicated as much when he listed the reasons for creating the Corps in the Navy:

> Further, *decisions of the Supreme Court of the United States with regard to furnishing free legal counsel to the accused must eventually be consistently carried out in the armed services*, and this would require a substantial number of lawyers. So it is clear from these and other things that the responsibilities of the Navy lawyers have increased substantially through recent years, and

[51] 114 Congressional Record (90th Congress) House, H9718 (October 10, 1968). Mr. King apparently analogized special courts with misdemeanor trials, which would leave summary courts to be analogized with petty offense cases.

[52] Such Corps already existed in the Army and the Air Force.

> it seems clear for this reason alone that the Navy should be allowed the same organizational structure in this field as is enjoyed by other branches of the services. Subcommittee No. 1 Hearing on Title IV (to Establish a Navy Judge Advocate General's Corps) of H.R. 226 . . .; House of Representatives, 90th Congress; included in Legislative Histories, Military Justice Act of 1968.

"Thus, it is respectfully urged that the Congress clearly did not recognize any special, overriding military necessity for deprivation of liberty at an uncounselled summary court-martial. Indeed, the previous discussion seems to indicate that *Congress believed that Supreme Court decisions as to the right to counsel should and would be applied in the military*.

* * *

"In its brief in United States v. O'Brien, *supra*, the Government states:

> Most Air Force personnel are stationed at Air Bases which are relatively large, fixed communities where military lawyers are available. This is a far cry from the highly mobile seagoing and combat environment of the Navy and Marine Corps, where military lawyers frequently are unavailable.
> [Brief of Appellee at 65]

While the appellant does not dispute the former remark, the latter assertion is subject to rather serious dispute. The United States District Court in DAIGLE rejected such contentions as a reason not to apply ARGERSINGER. As the court in DAIGLE noted, such arguments did not appear particularly weighty in view of the fact that there were "two large military bases with no apparent lack of qualified lawyers" on Oahu.

Similarly, the summary court-martial suffered by Private Alderman occurred at Camp Lejeune, which is neither small nor seagoing. Indeed, a sampling of the instances of summary courts-martial now involved in similar issues before this Honorable Court seems to demonstrate that, in practice, summary courts appear to be held usually at sizable military installations.[53] This

[53]O'Brien was tried by summary court at 3d Battalion, 4th Marines, 3d Marine Division. *United States v. O'Brien*, Docket No. 25-970 (petition granted 3 October 1972). Appellant Mullinix was tried by summary court at Naval Station, Long Beach, California. *United States v. Mullinix*, Docket No. 26,238 (petition granted 8 December 1972). Appellant Brown was tried by summary court at 8th Engineer Battalion, Force Troops, Camp LeJeune, North Carolina. *United States v. Brown*, Docket No. 26, 155 (petition granted 16 November 1972). Appellant Drake was tried by summary court at Headquarters and Service Battalion, Fleet Marine Force, Atlantic, Norfolk, Virginia. *United States v. Drake*, Docket No. 26, 338 (petition granted 2 January 1973). Appellant Faust was tried by summary court at Marine Aviation Training Support Group, NATTC, Jacksonville, Florida. *United States v. Faust*, Docket No. 26-377 (petition granted 27 December 1972). Appellant Boutwell was tried by summary court-martial at Marine Corps Air Station, New River, Jacksonville, North Carolina, which is close by Camp Lejeune. *United States v. Boutwell*, Docket No. 26,319 (petition granted 21 December 1972). Appellant Morris was tried by two summary courts-martial at USS Mispillion, homeported at Long Beach, California, no small base. *United States v. Morris*, Docket No. 26,379 (petition granted 8 January 1973). This list is not meant to be exhaustive of all the cases presently before this Honorable Court involving ARGERSINGER-type issues.

"It should be observed that of the above-listed cases, only MORRIS involved a serviceman attached to a vessel. Even in MORRIS, a reading of the record of trial seems to indicate that the USS Mispillion was quite often in port at Long Beach, so that legal assistance would not have been unavailable. MORRIS

seems in marked contrast to the Government's argument. In these and in countless other cases, the 'mobility' of the Navy has no bearing on whether or not ARGERSINGER should apply. That a Navy icebreaker may be isolated for a few days in the Arctic Ocean should not prevent a Marine at Camp Lejeune from receiving the assistance of lawyer counsel.[54]

"Apparently, the Government would have this Honorable Court gauge 'necessity' by exceptional circumstances rather than by the rule. That position is contrary to the spirit manifested in Articles 27 and 38 of the Uniform Code of Military Justice. It is respectfully urged that the Government's position is without merit and should be rejected.

indicates the fact that a serviceman is attached to a vessel should not deprive him of the right to counsel under ARGERSINGER. For it is simply not true that all Naval vessels are at all times on the high seas and never in port, where their legal needs, among other needs, may adequately be serviced.

"Furthermore, according to the Government's data in its O'BRIEN brief (Appendix B), a great number of the offenses at summary courts-martial are unauthorized absence. It is difficult enough to begin an absence while one's ship is at sea; it is even more difficult to surrender to or be apprehended by one's ship at sea. Such cases must wait to be tried upon the return of the ship to port or until copies of the relevant service record entries are forwarded to the base holding the accused.

[54]The Government suggests that a ship at general quarters can't afford to hold a summary court-martial with a lawyer present. If a ship is at general quarters, one would think it could not afford to hold summary court-martial with or without a lawyer. Neither that situation nor a fire-fight is the moment for a court-martial, with or without counsel.

"The argument of 'necessity' is one, of course, which the Navy has raised on previous occasions:[55]

> [T]he naval service is of the view that appointment of counsel qualified in accordance with Article 27(b) is impracticable, if not impossible, in its special courts-martial, because of the distribution of its personnel worldwide, many in small ships upon which no qualified counsel are available. (*United States v. Culp, supra,* 14 USCMA, at 199, opinion of Kilday, J.).

"In enacting the Military Justice Act of 1968, the Congress appears to have rejected such claims from the Navy. Indeed, since the effective date of that Act, the additional right to lawyer counsel has been accommodated. According to the data supplied by the Government in Appendix B to its Brief in O'BRIEN, the Navy and Marine Corps conducted successfully almost 10,000 special courts-martial in 1972. There is no reason to assume that ARGERSINGER cannot also be accommodated, especially since the right to appointed counsel need not be given in every summary court-martial.

"Implementation of ARGERSINGER in the military will not mean any burden more onerous than that placed upon many civilian courts. See discussion of the courts in Wood, South Dakota, in Mr. Justice Powell's

"[55]Cf. Senator Tobey's observation during the floor debates on the Uniform Code of Military Justice:

> I am reminded of the opposition of many naval officers to the abolition of flogging 99 years ago. Somehow the Navy survived.

Congressional Floor Debate on the Uniform Code of Military Justice 538.

opinion, concurring in the result in *Argersinger v. Hamlin, supra,* 92 S.Ct. at 2024. Chief Justice Burger's comment in his opinion concurring in the result is true in military law as it is in civilian law:

> The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it. 92 S.Ct., at 2015.

"It is thus respectfully urged that application of ARGERSINGER does not conflict with any overriding military necessity because there is no overriding military necessity. Thus, even using the balancing test suggested by the Government in O'BRIEN (Appellee's brief, page 30), the result still obtains that ARGERSINGER should be applied in the military. As the Court noted in ARGERSINGER, the right to counsel belongs to a small number of the truly most fundamental rights of all. It is a right which tends to give substance to all the other rights in American jurisprudence. When this most fundamental and precious right is balanced against the unsupported assertion of overriding military necessity, it is that right which must prevail. Appellant respectfully urges that the assertion of military necessity, upon close inspection, proves to be just that, a mere assertion; there is none, in fact.

"This is a much more compelling case for the application of the Supreme Court's pronouncements than was TEMPIA. The right to counsel in TEMPIA was a pre-trial right and was hoped to vindicate the right against self-incrimination. In contrast, the right to counsel in ARGERSINGER is the right to counsel at trial, which will vindicate a whole panoply of other trial

rights. Some indication of the relative importance of these two rights is indicated by the fact that the Supreme Court has held the right to counsel at trial retroactive, but not the right to counsel at pre-trial interrogations.[56] Furthermore, in TEMPIA, military law, by virtue of Article 31, already afforded some protection to an accused and the Supreme Court in MIRANDA spoke favorably of the military practice. Such is not the case with respect to "counsel" at a summary court-martial.

"In summary, then it is respectfully urged that no special military necessity exists such that arguably ARGERSINGER should not be applied, nor has Congress made such a determination of necessity.[57] Even if application of ARGERSINGER may prove occasionally onerous, that is no reason not to apply the case to military law, since the right involved is so fundamentally important. In short, the Government's argument should be rejected, and ARGERSINGER applied." (This concludes quotation of portion of *Alderman* brief.)

Perhaps the most exhaustive and authoritative study of summary courts-martial in recent years was written in 1971 by Eugene R. Fidell, L.L.B. Harvard, 1968,

"[56]Cf. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963), with *Johnson v. New Jersey*, 384 U.S. 719 (1966).

"[57]As a final note, a Department of Defense Task Force has recently recommended that '[c]ounsel should be detailed to represent the accused and the government' before summary courts-martial. *Report of the Task Force on the Administration of Military Justice in the Armed Forces* at 76-77 (November 30, 1972)."

who had been a Lieutenant in the U.S. Coast Guard Reserve assigned as an Assistant Legal Officer in Queens, New York. In "The Summary Court-Martial: A Proposal", 8 Harvard Journal on Legislation, 571, 572, Fidell concludes that "the summary court is unessential to the administration of military justice" aside from the view that "it does not meet existing constitutional standards".

At p. 573 Fidell presents an official table showing distribution of all courts-martial in all military services for the years 1962 through 1969. The percentage of summary courts to the total in 1962 was 64%; it dropped to 25% in 1969. The explanation, Fidell says at p. 572, "lies in the expansion of nonjudicial punishment powers accomplished in 1962". (Article 15, UCMJ; 10 U.S.C. 815). He continued:

> "Many cases which would have been referred to summary courts prior to the effective date of the amended Article 15 have, in subsequent years, been handled at mast. It is to be expected that this trend will continue, as commanders will continue to prefer to administer prompt justice personally, rather than relying on the referral of charges to a summary court officer, who may be more inclined to dismiss offenses which would be unhesitantly punished at captain's mast. To the extent that the expanded Article 15 directly reinforces the position of command, it enjoys a preferred position over the summary court."

Further on the subject of "necessity", Fidell stated at 573-74:

> "Summary courts are also said to be necessary because they provide another step in the progression of punitive measures, permitting a command to invoke a more serious sanction

without convening a special court-martial. The plain answer to this argument is that the summary court is no more powerful than the command himself would have been at mast, provided the commander is at least the grade of major or lieutenant commander. Indeed under his nonjudicial punishment powers a commander may impose a total forfeiture equivalent to one month's pay, while the summary court may only adjudge a maximum forfeiture of two-thirds of one month's pay.[6] If a commander imposes less than his jurisdictional maximum at a man's initial appearance at captain's mast, the maximum can, in a proper case, be imposed at his next appearance, thus providing an intermediate step prior to appearance before a special court-martial. Alternatively, if the man's initial appearance at nonjudicial punishment were for an offense sufficiently serious to invoke the command's jurisdictional maximum powers, there seems to be no impropriety in referring the next, more serious, charge to a special court. As always, the commander will then have the discretion to approve only so much of the sentence, in case of conviction, as he deems just.

"Commanding officers in the field and on floating units are the best judges of whether the summary court-martial is essential to the military justice system. *The data already cited suggest that they are concluding it is not essential.* There is reason to suspect that if the tribunal were no longer available, no one but the historians would miss it." (Footnote omitted; emphasis added).

The Department of Defense's *Report on the Task Force on the Administration of Military Justice in the Armed Forces*, Nov. 30, 1972, contains the following:

(a) Recommendation of abolition of summary courts-martial due to lack of need and procedural protections. Pages 76 and 122, Vol. 1.
(b) Recommendation of interim appointment of counsel for accused at summary courts-martial, Page 76, Vol. 1.
(c) Declaration that "Virtually every case now being tried by summary court-martial could be appropriately handled by either non-judicial punishment or tried by special court-martial." Page 46, Vol. II.

But the Navy continues to maintain that *Argersinger* should not be made to apply to summary courts-martial, despite the Army and Air Force voluntary compliance in July, 1972, because the Navy "has large numbers of enlisted men isolated for extended periods of time on ships at sea.". Federal parties' Brief, note 33, p. 35. The fallaciousness of that argument was graphically shown in footnote 53 of the *Alderman* brief, supra, highlighting the fact that the great preponderance of Navy and Marine Corps summary courts are held not on ships at sea but on military land bases (i.e. *Daigle*, Oahu, Hawaii; *Henry*, El Toro, California; *Betonie*, Jacksonville, Florida; *Alderman*, Camp Lejeune, North Carolina), and that a "great number of the offenses at summary courts-martial are unauthorized absence", which cannot be tried on a ship at sea. The latter is confirmed by the federal parties' brief, p. 32: "For example, more than half the offenses tried by summary courts-martial in the Navy in 1973 involved some form of absence from duty".

But the most telling confirmation of the fact that few, if any, summary courts are held aboard ship,

whether docked or at sea, is the Navy's own regulation, following Article 15(a), 10 U.S.C. 815(a), which makes personnel attached to ships the only servicemen who cannot demand trial by court-martial in lieu of non-judicial punishment. Title 32, Code of Federal Regulations, Chapter VI–Department of the Navy (1974), Section 719.101(b), reads:

> "(b) Limitations on imposition of non-judicial punishment–
>
> > (1) *Demand for Trial.* A person in the Navy or Marine Corps who is attached to or embarked in a vessel does not have the right to demand trial by court-martial in lieu of non-judicial punishment."

It seems clear, thereby, that in actual practice, the Navy avoids conducting *any* courts-martial aboard ship; elsewhere nonjudicial punishment may be refused for a substitutional court-martial (Article 15(a)), and a summary court-martial may also be refused (Article 20). Nonjudicial punishment under Article 15 aboard ship is meted out instead of a summary or special court-martial, or if the offense is too serious for Article 15 procedure, court-martial is apparently delayed until the ship reaches a base or the services of lawyer counsel otherwise can be obtained. Accordingly, it would appear that the "problem" for "ships at sea" is virtually non-existent.

Even at isolated posts, any lack of lawyers should also present no problem, for as previously pointed out, *no court* has ruled that "counsel" at summary courts-martial must be lawyers. Mr. Justice Brennan's concurring opinion in *Argersinger* indicates that such flexibility, as suggested by the Court of Military

Appeals and by the District Courts in *Daigle* and this case, is possible even in civilian proceedings.

Concededly there will be times when, owing to the circumstances in which a unit finds itself, a lawyer cannot be obtained. In these circumstances, one commentator has suggested, similarly as Judge Pence in *Daigle*, 348 F.Supp. at 1080-81, that the military "must . . . provide the best counsel available."[7] The same author urged that "only officers and senior enlisted personnel ought to be allowed to serve in a counseling capacity."[8]

This flexibility is manifest in the policy adopted by the Nation's other seagoing Armed Force, the United States Coast Guard, which, like the Navy, also has to deal with the possibility of summary courts convened at sea.[9] That service has directed, in Commandant Notice 5810 of June 18, 1973, that military defense counsel means, for summary court-martial purposes:

> "A. A lawyer qualified under Article 27(b), UCMJ;
>
> B. A CWO (commissioned warrant officer) who has served as a legal office administrator or YN

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[7]Comment, *Military Law Right to Counsel at a Summary Court-Martial*, 7 Suffolk L. Rev. 719, 728-29, Section n.59 (1973).

[8]*Id.* at 729 n.59 citing 10 U.S.C. Section 827(c)(1) (1970).

[9]Indeed, it may also be worth noting that the ship-at-sea exception is even more applicable to the Coast Guard since it is very rare for a Coast Guard cutter to have a lawyer officer aboard, while the Navy's larger units do. Further, Naval vessels more generally operate in groups, and a judge advocate could be "borrowed", even at sea.

(yeoman, or secretary) in a legal office;

C. A commissioned officer who has graduated from the non-lawyer course at U.S. Naval Justice School, Newport, R.I.; and

D. A commissioned officer who has completed law school courses in evidence and criminal law." ALCOAST 003, Commandant, U.S. Coast Guard message 182104Z/003 June 1973.[10]

These guidelines are useful in illustrating the various types of personnel who might be available to a command even if a lawyer were not on hand.

Some discretion must be accorded the commanding officer in the isolated unit situation. The discretion is not unbridled, however, and should be examined against an appropriately stringent standard by reviewing authorities. This review will not be a novelty in military law, which has in the past develop d an extensive body of decisional law on various questions involving the availability of personnel.[11]

From all of the foregoing, therefore, it seems clear that Congress has recognized no necessity to place

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[10]*Cf.* Fidell, *The Summary Court: A Proposal*, 8 HARV. J. LEGIS. 571, 607, (recommending use of non-lawyer graduates of armed service justice schools as summary court officers where judge advocates are not available).

[11]Some examples:

1. Availability of lawyer defense counsel. Article 27(c)(1).
2. Availability of a military judge. Article 19.
3. Availability of enlisted personnel to serve as court-martial members. Article 25(c)(1).
4. Availability of a requested witness. *United States vs. Daniels*, 23 USCMA 94, 48 CMR 655 (1974).

limitations upon a military accused's right to counsel at any stage of proceedings which may result in confinement or ultimately in a punitive discharge, and has indicated no intention or desire to limit the serviceman's constitutional right to counsel. By way of summary of argument presented by plaintiffs in this part I:

1. Lawyer defense counsel is provided at all general courts-martial and at all special courts-martial in which conviction results in a bad conduct discharge ("BCD"). Article 27 and 27(b).

2. Defense counsel at a non-BCD special court-martial is provided, but need not be a lawyer. Article 19.

3. Article 20, providing for summary courts-martial, was last amended in 1968, which was *prior* to this Court's 1972 precedential decision in *Argersinger* that counsel must be provided an accused in the trial of any offense which results in imprisonment.

4. The accused may refuse a summary court-martial at which he is not provided with counsel and which may result in confinement and ultimately in punitive discharge by virture of the military "escalater clause". Article 20 and MCM Par. 27c.

5. The appointment of military defense counsel at summary courts-martial upon request of the accused is not forbidden by Congress.

6. The accused may retain defense counsel to represent him at his own expense at a summary court-martial.

7. For informal disciplinary action dealing with minor offenses, punishment for which may include "correctional custody" but not confinement, and the

disposition of which does not constitute a conviction which may ultimately lead to punitive discharge, Congress has provided for commanding officers' nonjudicial, administrative proceedings. Article 15.

8. Personnel attached to or embarked on ships may not refuse nonjudicial punishment to insist on courts-martial in which appointment of defense counsel is required. Article 15(a).

9. Where counsel is not required to be a lawyer, and lawyer counsel is not reasonably available, defense counsel at courts-martial may be a nonlawyer who is best qualified to serve as counsel.

II

HISTORICAL EVIDENCE SUPPORTS JUDICIAL DECISIONS THAT SIXTH AMENDMENT RIGHT OF COUNSEL APPLIES TO COURT-MARTIALS

Plaintiffs' opening brief has pointed out that the United States Court of Military Appeals has held since 1960 that the right to counsel of the Sixth Amendment is preserved to servicemen. Part I, pp. 11-16. The Government's argument that the Sixth Amendment right to counsel does not apply in the military essentially asks for an overturning of that Court's determination of this issue, as most recently affirmed in *Alderman*. Such an argument, should it prevail, would result in a major diminution of the constitutional rights afforded American servicemen.

The Court of Military Appeals first considered the specific issue of the applicability of the Sixth

Amendment right to counsel in military courts in *United States v. Culp*, 14 USCMA 224, 34 CMR 4 (1963). In *Culp*, the Navy Board of Review had reversed a *special* court-martial on the ground that the Sixth Amendment right to counsel required lawyer counsel at inferior courts-martial. While there was no opinion of the court, as such, in *Culp*, the Court determined that, as the law then stood, there was no right to *lawyer* counsel in special courts-martial. However, the Court established the principle that the Sixth Amendment right to counsel applied in military law.

Thus, Judge Quinn stated:

> "It has long been my position that service personnel 'are entitled to the rights and privileges secured to all under the Constitution of the United States unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' Hence, I disagree with the conclusion [of Judge Kilday] that the Sixth Amendment's guarantee of the right to counsel is not applicable to trials by courts-martial. . . . The critical inquiry is: Does Article 27(c) of the Code satisfy the requirements of the Sixth Amendment?" (14 USCMA, at 216-17).

Similarly, Judge Ferguson stated:

> "I am satisfied that the Sixth Amendment, insofar as it pertains to the right of counsel, applies in trials by courts-martial. I am equally satisfied that Private Culp was not deprived of this constitutional right." (14 USCMA, at 219).

Judge Kilday, in his independent opinion in *Culp*, alone believed that the Sixth Amendment right to counsel did not apply in the military. For a number of

reasons, however, it is rather doubtful whether Judge Kilday would have adhered to that belief down to the present day. First, Judge Kilday to a large degree based his belief on an analogy of the Sixth Amendment right to counsel with the Sixth Amendment right to jury trial. He noted that the right to a jury trial was not applicable in military law. He continued:

> "I pose the question: Can there be a distinction between the right of an accused to jury trial and 'the Assistance of Counsel for his defense'?
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> * * *
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> "We have seen that the apparently mandatory provision of the Sixth Amendment of trial by jury is, when correctly interpreted, restricted by the common law as it existed when the amendment was adopted, its contemporary interpretation, and in the light of the long-continued and consistent interpretation thereof. Does the same result follow as to assistance of counsel? I believe it does." (14 USCMA at 208, 209-210, 33 CMR at 410, 411-412).

Judge Kilday's analogy was similar to that of the Florida Supreme Court in *Florida ex rel. Argersinger v. Hamlin*, 236 So. 2d 442 (Fla. 1970):

> "Assuming *arguendo* that that Court will eventually decide that *Gideon* should be extended to include misdemeanor trials, it is fair to presume that it would apply to the right-to-counsel rule the same principles applicable to a determination of the right to a jury trial, namely, that this right extends only to trials for non-petty offenses punishable by more than six months imprisonment." (236 S.2d at 443).

This analogy was, however, expressly rejected by this Court in *Argersinger*:

> "We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." (407 U.S. at 30-31).

Without this analogy, it would appear that Judge Kilday would not have adhered to his belief as to the right to counsel in *Culp*.

It thus appears that the analogy proposed by Judge Kilday was properly rejected by the majority of the Court of Military Appeals in *Culp*. In a similar vein, it should be noted that the historical material cited by the Government in its brief in the instant case is largely the material cited also by Judge Kilday in his *Culp* opinion. A majority of the Court rejected that historical argument in *Culp* and *Alderman*, as did the Fifth Circuit in *Betonie* and the District Courts in Hawaii and California in *Daigle* and the instant case.

It should also be noted that Judge Kilday appeared to move away from his *Culp* opinion in the later case of *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967), which involved the application of military law of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* had established that the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination required that an accused at an interrogation be afforded appointed counsel and be specifically informed of this right. See 86 S. Ct., at 1611. Judge Kilday concluded that Supreme Court decisions of constitutional dimension such as *Miranda* were binding upon the military. He did *not* limit his conclusion solely to the Fifth Amendment aspects of *Miranda*:

"The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal Court, and we have no power to revise, amend, or void any of the holdings of *Miranda, even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.*" (16 USCMA, at 640, 641; emphasis supplied).

In sum, then, it is not at all evident that Judge Kilday would have now adhered to his opinion in *Culp*. Indeed, the foregoing considerations rather strongly suggest the reverse.

It is respectfully urged that the military court's majority conclusion that the Sixth Amendment right to counsel is preserved to servicemen is correct. The same conclusion was reached by the Court's majority in Alderman. The historical argument advanced by the Government in that case and in the case at bar is essentially the same as that which was also rejected by the Fifth Circuit in *Betonie, supra*. Controverting the historical "support" presented by the Federal Parties in their Brief, pp. 28-31, for excluding counsel for courts-martial, there is strong historical evidence that the drafters of the Bill of Rights intended the provisions of the Bill, other than those explicitly excepted or excepted by necessary implication, to apply in military cases. Further, it is evident that at the time of adoption of the Constitution and the Bill of Rights there *was* a right to counsel recognized in courts-martial.

A scholarly presentation of this evidence is made by Gordon D. Henderson, in *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957). Mr. Henderson considered such

factors as the manner in which the Fifth and Sixth Amendments developed in Congress, State Bills of Rights adopted in seven states, and several state suggestions for provisions for a federal Bill of Rights. For present purposes, it will be sufficient to discuss here the evolution of the Fifth and Sixth Amendments in Congress.

Mr. Henderson noted that James Madison originally proposed in the House that the original jury trial provision in Article III of the Constitution be deleted and replaced by a new provision which secured the rights to grand and petit juries (together with such appurtenances as that jurors would be from the vicinage, the requisite of unanimity, and other "accustomed requisites") *except* in impeachments and military cases.[12] Had Madison's original proposal been adopted, "there would have been no difficulty in construing the provision of the Bill of Rights, except the provisions for grand and petit jury, as applying to courts-martial," as Mr. Henderson noted. *Ibid*, at 310.

This original proposal was *not* adopted, however, because of strong feeling in the House that any Amendments should be in the form of additional clauses to the Constitution rather than as deletions of and substitutions for any of the clauses of the original Constitution.[13] Madison's proposal was drafted again, this time in the form of an additional provision.[14] The

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[12] The original Article III provision regarding jury trials already excepted impeachments.

[13] Henderson, *op cit.*, at 311.

[14] *Id.*

House passed the proposal, together with a number of others. This proposal, numbered ten, and two others, numbered eight and nine, are relevant to the issue at hand.[15]

> "Eighth. No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> "Ninth. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.
>
> "Tenth. The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways [sic] infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State."

[15] *Id.*, at 311-312.

> the indictment and trial may by law be authorized in some other place within the same State."

The proposals were then forwarded to the Senate, which proceeded to consider them. The eighth was adopted with one change: substitution of "be twice put in jeopardy of life or limb by any public prosecution" for "except in cases of impeachment to more than one trial or one punishment." The ninth was adopted without change. All the tenth article was eliminated except the provision:[16]

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury."

Mr. Henderson then stated:

> "As the amendments stood at this point, there was no petit-jury guarantee and no mention of military cases. Several days later, on reconsideration, the Senate incorporated the grand-jury guarantee, which was now the tenth article, into the eighth article. This time military cases were specifically exempted from the scope of the grand-jury provision. The article was not phrased exactly as is the fifth amendment. Thus it was that when the Senate finished its debate on the house proposals there was no petit-jury guarantee.
>
> "This history demonstrates quite clearly that the Senate thought, as did the House, that courts-martial would be excluded only from the grand- and petit-jury guarantees. Madison's letters show that the cause of the Senate's disapproval of the tenth article must have been the failure to agree upon an appropriate definition of the vicinage from which the petit jury was to be taken.

[16] *Id.*, at 312.

Apparently there was no controversy in the Senate over the applicability of the amendments to courts-martial."

(*Id.*, at 312, 313; footnotes omitted.)

He noted:

"In his letters Madison listed several of the Senate's objections to the House proposals. The objection to the tenth article was that in the petit-jury provision the vicinage from which the jury was to come and the 'accustomed requisites' of jury trial could not be defined in a way that would be satisfactory to all of the states, which had differing practices. Madison's failure to mention that there was any objection in the Senate because the House proposals could be read as covering courts-martial is strong evidence that no such objection was made."

(*Id.*, at 322-25, footnotes omitted).

The conference committee appointed to reconcile the Senate and House proposals recommended that the petit jury trial guarantee be restored and placed in the ninth article; the committee was silent as to a military exception. The Senate and House followed the recommendation of the committee, so that the ninth article was now in words identical with the actual Sixth Amendment. This and the other adopted proposals then went to the states for consideration.[17]

Mr. Henderson thus concluded:

"The Madison letters, together with the evolution of the amendments in the Senate, lead also to the conclusion that the changes made by the Senate-House Conference Committee were not

[17] *Id.*, at 313.

intended to make the amendments inapplicable to courts-martial. The present sixth amendment is vague because the important petit-jury guarantee, after having been phrased so as to compromise the disagreement between the houses, was tucked into it. In order to satisfy the Senate objections, this guarantee had to be phrased very briefly. It became merely a guarantee of a trial by an impartial jury of the state and district, to be previously ascertained by law, where the crime was committed. This was too brief to warrant being a separate amendment. Nor, as a matter of syntax, could it conveniently be added to the fifth amendment, which contained the grand-jury provision with its clause excepting military cases. It would fit very neatly into the ninth Article of the House proposals, which could be changed to read:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law*, and to be informed. . . .' (Emphasis added.)

But an exception for military cases could not be easily added to the proposal in this form.

"In the process of adjusting the disagreements between the houses over the crucial substantive jury problems, the difficulty in applying the rephrased amendments to courts-martial might well have been overlooked . . . Furthermore, as we have seen, it is no easier to construe the amendments as changed as not applying to courts-martial than it is to construe them in the opposite manner.

"On the whole, therefore, the evidence of the original intent favors the view that the bill of rights was intended to apply to those in the land and naval forces."

(*Id.*, at 323-324.)

This constitutes the historical evidence that the framers intended the Bill of Rights to apply to the military and that the Sixth Amendment rights other than the jury trial right were intended to apply to courts-martial.

Part of the Government's historical argument appears to be based upon limitations of the right to counsel at courts-martial contemporaneous with the Bill of Rights. At the time in question, accuseds in courts-martial were afforded the right to the assistance of counsel, although that right had not yet developed as far as the right in state trials. The basic limitation on counsel was that he could not directly address the court-martial; rather, he had to submit papers in writing or advise the accused how to address the court. He *was* permitted to be at his client's side and give him counsel during the trial. Counsel was thus permitted to advise and assist his client during the trial with full and undivided loyalty. Counsel was invariably permitted to fulfill many important functions:

> "It is at the same time not unusual for a prisoner to request the court to allow him the aid of counsel to assist him in his defence, either in the proper conduct of exculpatory proof, by suggesting witnesses, or in drawing up in writing a connected statement of his defence, and observations on the general import of the evidence. This benefit the court will never refuse to a prisoner; because under those unhappy circumstances, the party may either want ability to do justice to his own cause, or may be deserted by that presence of mind which is necessary to command and bring into use such abilities as he may actually possess." Macomb, *A Treatise on Martial Law and Courts-Martial: As Practiced in the United States of America*, 95-96 (1809)

The reluctance to permit lawyers to speak directly to the court-martial members appears to have been derived from a fear that lawyers in general were "utterly ignorant of military law and practice." *Id.* Thus, counsel at courts-martial were advised:

> "[not] to force the axioms and rules of the civil courts upon a military tribunal, but to instruct himself in that law which regulates their procedure, and accommodate himself to their forms and practice." *Id.*

(It might be added by interpolation that the objection that lawyers were usually ignorant of military law is long since obsolete, in view of the establishment in the Army, Navy and Air Force of Judge Advocate General's Corps and the existence in the Marine Corps and Coast Guard of cadres of Judge Advocates and law specialists, whose members are certified competent to practice in courts-martial. See Article 27, Uniform Code of Military Justice.)

Another early treatise that of Isaac Maltby, published in 1813, states:[18]

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[18]Using the British distinction between "barristers" and "solicitors," it might be ventured that the court-martial accused had the right to secure the services of an in-court counsel, like a "solicitor," who, however, was not permitted to address the court directly in the fashion of a "barrister". A solicitor is defined as "a person currently admitted to practice law and conduct litigation in any English court including the officers formerly called attorney-at-law and proctor but distinguished from the barrister in not having the right to plead in open court except in a few minor courts." 2(a)(1), *Webster's* Third New International Dictionary (1966).

> "Attorneys are never admitted to speak in behalf of a prisoner before a court martial. They are admitted as *advisers*, and not as speakers. Maltby, *A Treatise on Courts Martial and Military Law* at 74 (1813).

It thus appears that courts-martial permitted counsel to appear for and advise accuseds, so long as the counsel did not speak directly to the court. For example, in the trial of Lieutenant Beverly Kennon in 1824, counsel was "admitted to appear in court and assist in his defence." Counsel was, however, required to put motions and other matters, such as questions for witnesses, in writing to be submitted to the court-martial via the Judge Advocate. This was counsel "under the usual limitations."[19] Similar situations obtained in the trials of Captain Charles Stewart and General James Wilkinson, in 1825 and 1811, respectively.[20] A like procedure was employed in the case of General Hull in 1814.[21]

However, even these "limitations" were not invariably imposed, a fact which suggests that the right to counsel in military law was gradually evolving so as to include the right of counsel to speak directly to the

[19]Wiener, *Courts Martial and the Bill of Rights: The Original Practice*, I, 72 Harv. L. Rev. at 32, 33.

[20]*Id.*, at 28 and 34.

[21]*Id.*, at 29-31. General Hull had counsel "under the usual limitations" and was himself a trained lawyer. *Id.*, at 30. His argument that the Sixth Amendment should permit his counsel to speak to the Court did not prevail at trial. Since his sentence was remitted, this issue may have appeared mooted in his case. *Id.*, at 31.

court. If this was indeed the case, it was perhaps in recognition that the limitations were becoming obsolete and were in fact time-consuming and pointless. In the case of Captain James Barren in 1808, counsel not only appeared, but was permitted to make objections, to examine witnesses, and to read the defense.[22]

While the early statutes did not provide for appointment of individual defense counsel at a court-martial, this of course means that the right to counsel at that time was not thought to extend to free, appointed counsel in addition to counsel retained by the accused.[23]

Thus, the right to counsel who would advise the accused, though not, perhaps, speak to the court, had established itself by the time of the Constitution as a *custom* "invariably" granted. In such circumstances, it is submitted that the assistance of counsel was by this time a right and not merely a privilege. Common usage becomes common law. Certainly the Sixth Amendment was not intended to obliterate this developing right to counsel in courts-martial. Nor may it be concluded that this right was intended to be frozen for all time, unaffected by this Court's decisions regarding the right to counsel. Plaintiffs respectfully urge, therefore, that so much of the Government's historical argument as is premised upon an utter lack of the right to counsel in military trials is without foundation.

Wiener, who concluded that the framers had not intended the Bill of Rights to apply in the military,

[22]*Id.*, at 32; see also cases mentioned in footnote 210 of Wiener I, at 32.

[23]E.g., Article 69, Articles of War, Ch. 20, 2 Stat. 367 (1806).

nevertheless emphasized that it did not thereby follow that the framers would have reached the same conclusions in the context of the armed forces today. Wiener II, at 294.

In August of 1789, there were fewer than one thousand men on active duty. Wiener I, at 9. In modern times, millions of American men and women wear the uniform of their Nation's armed forces, some because of induction. Over three million persons were on active duty on June 30, 1970. New York Times Almanac, 1972, page 647. The vastly increased numbers of American citizens on active duty is a more than ample reason for preserving to those many persons their rights while they serve their country. Furthermore, the scope of offenses triable in courts-martial in 1789 principally encompassed offenses uniquely military in nature. Where servicemen were accused of offenses "punishable by the known laws of the land," they were to be turned over to the civil magistrates. Wiener I, at 10-11.

As Mr. Wiener notes, "the meaning and scope of the Constitution are not static, but . . . they change." Wiener II, at 304. Indeed, Mr. Wiener points out that some of the rights in the Bill of Rights, including the right to counsel, have been extended by this Court "far beyond the concepts of the Framers." Wiener II, at 298. That observation was made before *Gideon v. Wainwright*, supra.

III.

MINIMAL DUE PROCESS REQUIRES THAT EVERY ACCUSED HAVE HIS OWN DEFENSE COUNSEL AT SUMMARY COURT-MARTIAL BECAUSE IT IS A CRIMINAL PROSECUTION IN WHICH JUDGE SERVES AS PROSECUTOR AND CONVICTION MAY RESULT IN CONFINEMENT AND LIFETIME DISABILITIES

A. Summary courts-martial are criminal prosecutions by legislative and judicial definition.

Throughout their opening brief the federal parties seek to give the impression that summary courts-martial are statutorily intended to be, and in practice are, informal, non-adversarial disciplinary proceedings which are not criminal prosecutions. Further, insisting on unsupported claims of "military necessity", they would have this Court deny to men in the armed forces even the minimal due process rights of assistance of counsel that the Court afforded probationers in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and prison inmates in *Wolff v. McDonnell*, 94 S. Ct. 2963, 2982.

Plaintiffs' opening brief, in its critique of the *Daigle* opinion's limitations on the due process right of counsel resulting from analogizing to *Gagnon*, pp. 25-35, establishes that courts-martial are *criminal* prosecutions. That fact was indicated not only by all three judges of the United States Court of Military Appeals in *Alderman* (Brief for Petitioners, p. 28) in 1973, but as early as 1964 in *United States v. Crawford*, 15 USCMA 31 where Judge Quinn stated at p.34," . . .courts-martial are criminal prosecutions."

That the accused at summary court-martial is charged with a "crime", whether termed a "military" or "non-military" offense,[24] is well understood and accepted by military personnel. In *Military Law, A Handbook For the Navy and Marine Corps* ("Military Law"), LCDR Edward M. Byrne, JAGC, USN, United States Naval Institute, states at p. 114:

> "The summary court must serve both the accused and the society which suspects the accused of a *crime* and must use the legal standards guaranteed to every man in uniform who appears before a judicial proceeding." (Emphasis added).

The Fifth Circuit in *Betonie*, 496 F.2d at 1117, spoke directly to the Navy's vain efforts to distinguish summary courts-martial from criminal prosecutions:

> "We find the difference between courts-martial and civilian criminal trials to be much less significant than the similarities between the two types of proceedings, at least with respect to the Sixth Amendment. Both types of proceedings may lead to deprivations of liberty as well as property. Both generate potentially severe social stigma. Both have significant repercussions far beyond their immediate impact, in particular in the area of future employment."

Further, 496 F.2d at 1008, the Fifth Circuit emphatically stated:

> "The Navy presents other arguments in an attempt to distinguish military from civilian justice, but we find all of these attempted distinctions unconvincing. The fact remains that an accused entering into a court-martial faces potentially serious punishments of the type which *Argersinger* holds may not be imposed unless the accused has the assistance of counsel."

[24] It is significant to note that even by the federal parties' own statistics presented in their brief, p. 33, n.31, fourteen percent of total offenses tried to Navy summary courts-martial in 1973 were "non-military".

The federal parties in their brief also make the error of placing summary courts-martial on the same plane of informality and flexibility as Article 15 non-judicial, administrative proceedings. It is clear that they are not equivalents, for the former is one of the three statutorily designated *courts-martial* (Article 16, 10 U.S.C. 816), "utilizing the rules of evidence and standards for determining guilt provided for by the MCM." *Military Law*, p. 106.

Distinguishing between Article 15 and summary courts-martial proceedings in *United States v. Shamel*, 22 USCMA 361 (1973), Judge Quinn of the Court of Military Appeals pointed out at p. 363:

> "In *United States v. Johnson*, 19 USCMA 464, 467, 42 CMR 66, 69 (1970), this Court observed that 'an Article 15 punishment *is not a conviction*', so that proceedings at which such punishment is imposed do not require the appointment of a lawyer to represent the respondent. The substantive nature of the Article 15 proceedings is not, in my opinion, affected by anything said in the several opinions in the *Argersinger* case." (Emphasis added).

Nor do the federal parties draw the Court's attention to another vitally significant distinction between summary courts-mar and Article 15 proceedings, i.e., the "escalator clauses" in Par. 127c, MCM, which apply to summary courts-martial but not to non-judicial

punishment. Accordingly, as stated in *Military Law* at p. 114,

> "Conviction by a summary court-martial constitutes permanent blemishes upon an enlisted man's service record. If the accused is later tried for another offense by a special court-martial, two previous summary courts-martial may accelerate the permissible punishment to include a bad conduct discharge."

This is the "explosive quality" of summary courts-martial to which Fidell, supra makes reference at p. 585 and discusses at length at pp. 595-605. It is the basis for his statement at p. 595 that:

> "Viewing the summary conviction as a constituent element of later general or special courts-martial it is submitted that there should be a right to counsel at the summary court-martial *because of the escalators.*" (Emphasis added).

How conviction at summary court-martial may be utilized at later military proceedings by way of impeachment, in addition to aggravation of punishment, is detailed by Fidell at pp. 598-601, and its potential consequences in the form of severe economic losses at subsequent civilian proceedings are laid out at pp. 602-605.

One of the more serious effects of conviction by summary court is its use to justify an undesirable ("U.D.") or general discharge for "frequent involvement of a discreditable nature with civil and military authorities." DoD Directive 1332.14, par. VII, I., 1. Statistics supplied by Office of Assistant Secretary of Defense, Manpower and Reserve Affairs, for such discharges are:

1971–8427 (5230 U.D.'s, 2915 Generals);
1970–8035 (5720 U.D.'s, 2132 Generals);
1969–6975 (4701 U.D.'s, 1525 Generals);
1968–7649 (5439 U.D.'s, 1284 Generals;
1967–2407 (2220 U.D.'s, 133 Generals).

General and undesirable discharges are serious lifetime impediments to civilian employment and other amenities. 83 Yale L. J. No. 1 (1973), "*Judicial Review of Military Administrative Discharges*"; "*Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates.*" 9 Harv. Civil Lib. Civil Rights L. R. 227 (March 1974); Jones, "*The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*" 59 Mil. L. Rev. 1 (1973).

B. Summary court officer is both judge and prosecutor.

Attempting to depict summary courts-martial as something other than criminal prosecutions, the federal parties in their brief consistently repeat the erroneous assertion that the summary court-martial officer is not a "prosecutor". Thus, at p. 25 it is suggested that the summary court "without prosecutor or defense counsel" has received congressional approval. At p. 31 the bald statement is made that "since there is no prosecutor in the summary court-martial, there is no need to balance the skills of opposing parties"; again, in footnote 40 at p. 42, "there is no prosecutor in summary courts-martial."

These assertions are no more than a play on words and should not be credited by this Court. The federal

parties' suggestion would be more accurate if it were to the effect that there is no person acting *solely* as prosecutor at a summary court-martial, for surely the functions of a prosecutor detailed by Par. 79, Manual for Courts-Martial, 1969 (rev) ("MCM"), are performed by *someone*, and that person cannot be the accused, who is the only person other than the summary court officer necessarily present. Par. 79b refers to "the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena", "to take depositions", and to "take action similar to that taken by the trial counsel of a general or special court-martial" to obtain the attendance of witnesses. Par. 79d(3) provides that "witnesses for the *prosecution* will be called first and examined under oath as to all matters relevant to the offense charged." (Emphasis added). Are these not all prosecutorial functions which are performed by the summary court officer?

The reality of the situation is that stated most succinctly by Judge Pence in *Daigle*, 348 F Supp at 1079: "The summary court officer essentially acts as judge, prosecutor and defense counsel." This is virtually the same language as that used by the Ninth Circuit in *Daigle*, Pet. App. p. 33A. Scholarly commentary has always treated the summary court officer as "judge, fact-finder, prosecutor, and defense counsel." See Fidell at p. 576; *Military Law* at p. 105; and Comment, *Military Law Right to Counsel at a Summary Court-Martial*, 7 Suffolk L. Rev. 719, 726, n. 43 (1973).

Of course there is a prosecutor at summary court, and that prosecutor is none other than the trier of fact and finder of law the summary court-martial officer.

The structure of summary courts is similar to that found wanting from the standpoint of due process by the First Circuit in *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 720, (1966), where the court found that under the statutes of the Commonwealth of Puerto Rico calling upon the trial judge in district courts to interrogate Commonwealth witnesses and cross-examine the defendant's witnesses, "he must, to some extent at least, act as prosecutor."

In *Figueroa Ruiz*, where the defendant *was* represented by his own defense counsel, the court, relying in great part on this court's rulings in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) and *In re Murchison*, 349 U.S. 133 (1955), nevertheless held at 721:

> "We are satisfied that a federal or state court procedure, by which the judge was the one to introduce the government's evidence, and cross-examine on the government's behalf, would neither satisfy the appearance of justice nor be considered free of the 'possible temptation * * * not to hold the balance nice, clear and true between the State and the accused', and hence would deny the accused due process of law."

The dilemma of the "conflicting roles" of judge and prosecutor was graphically portrayed by the court in *Figueroa Ruiz*, 359 F.2d at 720:

> "Under the procedure in the Puerto Rico District Court the judge must alternate roles in rapid succession, or even assume both at once. Thus, when interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question

> put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men."

Similarly, this court held in *In re Gault*, 387 U.S. 1 (1967) that an infant in Juvenile Court proceedings is "entitled to his *own* counsel and not a multi-purpose official who must assume three conflicting roles at the same time." This court said further at p. 36:

> "Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this court." (Citing *Powell v. Alabama*, 287 U.S. 45, 61 (1932) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Assuming that most military officers are "fair-minded" men, those who are appointed to serve as summary court officers generally are not attorneys, let alone experienced judges, and yet it is argued by the federal parties that they are capable of accomplishing impartially "three conflicting roles at the same time." Some commentators have pointed to the possibility of some degree of bias in the pre-*Alderman* summary court in favor of the prosecution. Fidell states at p. 577:

> "Many believe that it is the rare summary court-martial that will grant a complete acquittal or dismissal for a technicality, due to a generalized fear of incurring the subtle wrath of a convening authority."

Lack of impartiality of non-lawyer officers was recognized by Judge Ferguson of the Court of Military Appeals, in another context, in *Culp*, 14 USCMA at 220:

> "To often, it must seem to the officer untrained in the law that his duty lies in the direction of the armed force to which he belongs rather than to the accused whom he represents, and there has not been inculcated in him any of the principles which so naturally form a part of the legal profession and which have impenetrably shielded the client's cause through the ages. It is difficult enough for a military lawyer to withstand the pressures exerted against his principal in the name of discipline and authority. See *United States v. Kitchens*, 12 USCMA 589, 592, 31 CMR 175, 178. It seems to me well nigh impossible for one untrained both in the law and the inviolable standards of the legal profession to put to one side what he might conceive as his responsibility to the service and devote himself entirely to the interests of an individual whom he may privately think undesirable."

C. Military personnel are no better equipped than civilians to defend themselves at trial.

The notion that enlisted men, because they are made aware of the contents of the Uniform Code of Military Justice as part of their military training, thereby become proficient enough competently and adequately to defend themselves in a criminal trial, is more fanciful

than common sense can accept.[25]

It is axiomatic that even a trained lawyer who tries his own case "has a fool for a client." To require the average enlisted man, "aided" by an officer who is prosecuting the case against him and also serving as judge, to try his own case is indeed to make a fool of him.

Plaintiffs in their opening brief, p. 32, have quoted the Fifth Circuit on this point as expressed in *Betonie, supra*. The logic of the position that an accused at summary court-martial is equally in need of his own defense counsel as at a special or general court-martial was presented by Judge Pence in *Daigle*, 348 F. Supp. at 1079:

> "(Yet) as the majority and Mr. Justice Powell pointed out in *Argersinger*, the *need* for counsel exists whenever a charge, no matter how petty, can lead to any period of imprisonment. This need, then, is the same regardless of *what* type of court-martial might be involved. This is made readily apparent by the fact that a person can never be tried by a summary court-martial if he objects thereto, 10 U.S.C. Section 820. By objecting, he then invokes the jurisdiction of the special or general courts-martial, with the attendant right to counsel which 10 U.S.C. Section 827 provides. If there is such objection to a summary

[25] An enlisted man is at a severe disadvantage if he must investigate his own case by interviewing his superiors who may be the witnesses against him. The defense of even an "AWOL" is not a simple matter. It is a highly technical attack on morning reports. See *The Advocate*, Vol. 2, No. 2., March, 1970. (A publication of the Defense Appellate Division, U.S. Army Judiciary.)

> court, since the offense is the same, the proof demanded before the special or general court-martial is also the same. It follows that the need for counsel is the same. However, prior to *Argersinger*, it is only in the special or general courts-martial that this need has been satisfied."

The Court of Military Appeals has clearly recognized that military personnel are equally needful of their own defense counsel as are civilians, and are in no better position because of military "training" to look after their own interests without independent counsel, regardless of what the charges may be.

Thus, applying this court's *Miranda* requirements in *United States v. Tempia*, 37 CMR at 259-260, to *all* military personnel at the pretrial stage, the military court said:

> "[I]t is important for [an accused] to know when to speak and when to remain silent. Hence, the Supreme Court held that under the Fifth and Sixth Amendments he is entitled to an attorney—*not a supposedly impartial arbiter who will later judge* whether the accused is to be prosecuted, but a lawyer who is peculiarly and entirely the accused's own representative; *who owes him total fidelity*; to whom full disclosure may be safely made in a privileged atmosphere; and from whom accused can learn with confidence a proper course of action . . . The Supreme Court has now established parity by demanding the accused likewise be furnished a legal advisor of his own *not one who is duty-bound also to weigh the interests of the government*; who can protect the accused with the attorney-client privilege; and to whom as here, he cannot [sic] relate the facts as he saw them and secure competent advice as to what course to follow." (Emphasis added).

Accordingly, the United States Court of Military Appeals recognizes that the lowest grades of enlisted men are in no better position to serve as their own defense counsel at trial than are civilians, about whom this Court said in *Powell v. Alabama*, 287 U.S. 45 (1932) at 68-69:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Even the intelligent and educated layman* has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. *He is unfamiliar with the rules of evidence.* Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. *He requires the guiding hand of counsel at every step*, in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (Emphasis added).

The need for independent defense counsel at summary courts-martial is indicated by the federal parties' own statistics presented in footnote 26, p. 26 of their brief. Those figures show an increase of acquittals of 32% in the 1974 six-months post-*Alderman* period as against the comparable 1973 six-months pre-*Alderman* period. The difference lies in representation by independent counsel.

With regard to the federal parties' reference, *id.*, n. 26, to the increase in number of days from preferral

of charges through final review in summary court proceedings since June 8, 1973, when the Navy started to provide counsel for the accused in accordance with *Alderman*, the statement of this court in *Stanley v. Illinois* 405 U.S. 645, 656, is pertinent:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Besides, as the federal parties concede at p. 33, Brief: "Summary courts do not have the overcrowded dockets and overworked officials typical of civilian misdemeanor courts."

D. Absolute right to counsel required under due process.

The federal parties' brief discusses at length, pp. 36-43, "the balancing of interests test which is necessary in due process inquiries", citing a number of decisions of this Court on the point. Plaintiff's opening brief previously has suggested that *Gagnon v. Scarpelli* (411 U.S. 778 (1973) is inapposite because that case dealt with probation revocation proceedings, which this

court pointed out are *not* criminal prosecutions. Plaintiffs' Brief, pp. 26-27. *Morrissey v. Brewer*, 408 U.S. 471 (1972), likewise is inapposite, because in *Gagnon*, this court said at p. 780, "Revocation of parole is not a part of a criminal prosecution." Similarly inapposite, because they do not involve criminal prosecutions, are *Goldberg v. Kelly*, 397 U.S. 254 (dealing with citizens' welfare benefits), and *Wolff v. McDonnell*, 94 S. Ct. 2963 (1974) (prison inmates disciplinary proceedings).

In *Gagnon*, this Court made reference, 411 U.S. at 787-88, to the fact that the "case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts v. Brady*, 316 U.S. 455 (1942), was later rejected in favor of a *per se* rule in *Gideon v. Wainwright* 372 U.S. 335 (1963)", citing also *Argersinger*. Because courts-martial *are* criminal prosecutions, plaintiffs submit, as they did in their opening brief at pp. 34-35, that the "*per se* rule" of *Gideon* and *Argersinger* for right to counsel applies to summary courts without qualifications resulting from any "balancing of interests test".

Plaintiffs respectfully urge that military courts-martial, if not the absolute equivalent, are at least "functionally akin to a criminal trial," as this court described juvenile delinquency proceedings in *Gagnon*, 411 U.S. at 789, n. 12. It is submitted that a military accused, similarly as the juvenile of *Gault*, "charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection." *Id.*, n. 12.

This court in *Argersinger* indicated that there is no reason to conclude that a person, just because he has

reached the age of 18, is fully able to defend himself without the assistance of his own counsel against any criminal charges that may result in his imprisonment. The *unqualified* right of counsel that this court in *Gault* afforded *all* juveniles in a civil proceeding "functionally akin to a criminal trial" should likewise be accorded to *all* enlisted men charged with crime in a proceeding which similarly may result in their confinement. Certainly, they are deserving of no less by way of due process than convicted criminals and prison inmates.

E. Fifth Amendment due process clause covers "equal protection" violations.

There is still another objection to be made both to the federal parties' position that there is no due process right to counsel at all at summary courts and that of the Ninth Circuit *Daigle* panel's conditional right as analogized to *Gagnon*. As a matter of Fifth Amendment due process, violations of equal protection by virtue of invidious discrimination must be given consideration in this matter.

Under Article 20, summary court-martial jurisdiction may not be exercised over officers, warrant officers, cadets, aviation cadets, and midshipmen. Additionally, the maximum punishment for enlisted persons over the pay grade E-4 is so circumscribed that few such personnel are likely to be tried in the summary court-martial forum. Manual for Courts-Martial, 1969 (Rev.), Paragraph 16(b). Such provisions as these establish classifications which result in discrimination. See Fidell, at p. 574. Military personnel who, as a

general rule, are likely to find themselves subjected to summary court-martial proceedings are enlisted personnel in pay grades E-1 through E-4, or precisely those who are most likely to have insufficient funds to exercise their right to retain civilian counsel. In these circumstances, it is appropriate that the provisions of Article 27(b) and (c) as to appointed military counsel be applied to all summary courts-martial as the general rule, for otherwise, those who cannot afford to retain their own counsel suffer invidious discrimination based on poverty.

Clearly, the argument in the immediately preceding paragraphs invokes concepts of equal protection of the laws as a part of Fifth Amendment due process. Although "equal protection" is not articulated in the Fifth Amendment, the concepts are applicable when assessing the substantive due process of federal actions. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Are there any rational grounds for distinction among the persons subject to trial by summary court-martial? Plaintiffs respectfully submit that this Court should decide that there are none. All are entitled under the concept of Fifth Amendment due process to the assistance of independent counsel for their defense when faced with the possibility of a conviction resulting in confinement.

F. Paucity of record in summary court raises due process problems.

Although plaintiffs strongly maintain that the Ninth Circuit *Daigle* panel's standard for right to counsel at

summary courts-martial is erroneously established by analogy to *Gagnon*, and improperly disregards this court's "per se rule" of *Gideon* as applied in *Argersinger*, they likewise strongly dispute the federal parties' objections to it which are based on the latter's unsupported claims of "military necessity" as an argument for providing no counsel at summary courts under any circumstances. Plaintiffs' foregoing argument has shown that no such "military necessity" exists. Further, the administrative problems in applying such a standard, as described by the federal parties in their brief, pp. 15-16, n.16, are certainly not an acceptable basis for total deprivation of a constitutional right. (See Argersinger). If in fact "counsel would probably be appointed in most cases", such a result would be truly salutary from the standpoint of maintaining good military morale.

With regard to the record of summary court-martial required on review, paucity of such record is another glaring weakness in the summary court-martial procedure which points to the need for counsel for *every* accused to satisfy due process.

The summary court-martial records under Par. 79(e), MCM, consist of only: (1) an outline of the rights of which accused was informed; (2) the names and addresses of witnesses who were listed on charge sheets but did not testify; (3) the names and addresses of witnesses who testified but were not listed on charge sheet; and (4) the number of previous convictions considered. "Unless otherwise prescribed . . ., the evidence considered at the summary court-martial need not be summarized or attached to record of trial."

The inadequacy of this "record" prevents the

discovery of many types of important errors and thus immunizes summary court-martial convictions from meaningful review.[26] For example, evidence of the validity of a waiver of the privilege against self-incrimination may not appear in the record transmitted for review. Additionally, review of the validity of a guilty plea, under *United States v. Care*, 18 USCMA 535, 40 CMR 247 (1969)[27] is virtually impossible, because the meager record provides no information upon which the reviewing officer can assess the voluntariness of the plea.

Finally, of crucial importance to the accused is the fact that there is no effective means of preventing the summary court-martial officer from considering his prior convictions, if any, in determining his guilt or innocence.[28]

Under the circumstances, to minimize the possibilities of error detrimental to the accused at the trial itself, each and every accused at summary court does indeed require the assistance of independent counsel and should be held entitled to it "per se".

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[26]The only types of errors discernible from the terse records are those which involve glaring irregularities in the charge sheets or the pleading, the total absence of proof to support a conviction, or gross violations of the rules concerning the admission of documentary evidence. Appointment of effective counsel would eliminate many of these errors at the outset.

[27]"A plea of guilty may meet the required standards [*McCarthy v. United States*, 394 U.S. 459 (1969) and *Boykin v. Alabama*, 395 U.S. 238 (1969)] if on the basis of the whole record the showing is clear that the plea was truly voluntary. . . ." *Care*, *supra*, at 251.

[28]See Fidell, *supra*, at 589.

The problems created by the conflicting roles required of the summary court-martial officer and the inadequacy of the record on review are compounded by the existence of lay judges. Only very rarely is the summary court-martial officer an attorney who is familiar with evidentiary and procedural rules, much less the "nice subtleties" of constitutional law. As the federal parties' brief concedes at p. 15, n. 15, statistics show that more than 30 per cent of Navy summary court-martial convictions in 1973 required modification to benefit the accused—and this on a meager record of trial!

IV.

OPTION TO CONSENT TO TRIAL WITHOUT COUNSEL TO AVOID GREATER PUNISHMENT FROM TRIAL WITH COUNSEL IS "UNCONSTITUTIONAL CONDITION"

The federal parties raise an issue in their opening brief, p. 10 and pp. 43-49, as to whether consent to trial by summary court-martial constitutes a valid waiver of the right to counsel under the provisions of Article 20, 10 U.S.C. 820. This question was not raised in the Ninth Circuit Court of Appeals in the Government's appeal of the District Court's decision in *Daigle*, 348 F. Supp 1074 (1972), so that there was no consideration of the question in the Ninth Circuit's decision in *Daigle*, 490 F.2d 358 (1973).

Likewise, the judgment by the Ninth Circuit in the instant case gave no consideration whatsoever to the

question, as it constitutes merely a single-sentence order which follows *Daigle*, 490 F.2d 358. (*Henry v. Warner*, 493 F.2d 1231 (1974); Pet. App. 1a-2a).

Accordingly, it appears that the question need not now be addressed by this Court. Cf. *Parker v. Levy*, supra, 94 S. Ct. at 2564. Further, it should be noted that no reference to such question was made by the federal parties in their petition for a writ of certiorari in this case. (No. 74-175).

If, however, this Court determines that this issue is properly presented here and should be considered by the Court at this time, it is submitted that this Court's doctrine of "unconstitutional conditions", as enunciated in *United States v. Jackson*, 390 U.S. 570 (1968), negates the federal parties' suggestion of "waiver".

It appears that the Government abandoned this issue on appeal both in the Fifth Circuit in *Betonie, supra*, and in the Ninth Circuit in *Daigle*, supra, and did not raise it before the United States Court of Military Appeals in *Alderman, supra*. In this regard, the Fifth Circuit said in *Betonie*, 496 F.2d at 1010:

> "The government also argued at trial that petitioners had waived their right to counsel, either by pleading guilty or by failing to demand a special court-martial. However, these issues have apparently been abandoned on appeal. In any case, *we think that reliance on these arguments would be futile.* See, *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L Ed 2d 138 (1968); *Rice v. Olson*, 324 U.S. 786, 65 S. Ct. 989, 89 L Ed 1367 (1945)." (Emphasis added).

In the Ninth Circuit District Courts where the Government's "waiver" argument was made at trial, both courts also rejected it principally on the basis of

the *Jackson* principle as expressed in *Daigle*, 348 F Supp at 1080:

> "This court is not persuaded by the government's argument that because petitioner could have objected to the summary court-martial, and thereby received the protections provided by a general or summary court, his constitutional rights were not violated. Leaving aside the difficulty of equating waiver with the lack of objection, the stickler is that by objecting to the summary court procedure (and thereby invoking the constitutional protections specifically secured him under 10 U.S.C. Section 827), the accused is forced to run the risk of receiving the greater punishment sanctioned by the general and special courts-martial. One cannot be 'punished' for the exercise of his constitutional rights. *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L Ed 2d 138 (1968)."

The District Court for the Central District of California in the instant case followed the Distrist Court of Hawaii in its *Daigle* opinion on this question, and added a number of other decisions by this Court in support of its position. Judge Williams said below, 357 F Supp at 503:

> "In *Daigle*, as here the Government argued that petitioners could have opted for general or special courts-martial and thus benefit from counsel. The Court in *Daigle* saw through this surface logic and recognized that by objecting to the summary court-martial proceeding (thus obtaining counsel) the accused is forced to run the risk of receiving a greater punishment sanctioned by the general and special courts-martial. The result flies in the face of the Supreme Court's articulated position against the doctrine of unconstitutional conditions–i.e.,

one cannot be 'punished' for the exercise of one's constitutional rights. *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L Ed 2d 138 (1968). Further, unconstitutional conditions on unemployment compensation (*Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L Ed 2d 965 (1963)), tax exemptions (*Spiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L Ed 2d 1460 (1958)), public employment (*Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L Ed 2d 811 (1968)), bar admissions, (*Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S. Ct. 702, 27 L Ed 2d 639 (1971)), and mailing privileges (*Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L Ed 2d 498 (1971)) have all been invalidated by the Supreme Court. In all of these cases, citizens were left free to exercise their constitutional rights so long as they were willing to give up a 'gratuity' which the State had no obligation to provide. Yet in each the Supreme Court found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms."

It is the *theory* behind this Court's decision in *Jackson* to which the Fifth Circuit and the Ninth Circuit District Courts alluded in their remarks denying the Government's contentions as to "waiver by consent". One writer has noted that "the theory employed in *Jackson* is a familiar one and requires that the exercise of constitutional rights cannot be penalized unless there are no less burdensome means to secure a more important policy goal".[29]

In *Jackson* this Court held unenforceable a federal statute which made the death penalty applicable only

[29]The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 159 (1968).

to those who contested their guilt before a jury. Speaking for the Court, Mr. Justice Stewart said, 390 U.S. at 581:

> "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

Continuing at p. 582, he said for the Court:

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that *needlessly* chill the exercise of basic constitutional rights. (Citations). The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is *unnecessary* and therefore excessive." (Emphasis added).

In the context of the case at bar, no court that has considered the matter to date has found sufficient "military necessity" to justify the denial of the constitutional right of counsel to an accused at summary courts-martial; accordingly the chilling effect of potentially greater punishment at special or general court-martial cannot be said to be offset by any need which might otherwise validate the alleged "waiver" represented by consent to summary court-martial.

The Federal Parties in their Brief, p. 49, seem to suggest that somehow *Brady v. United States*, 397 U.S. 742, and *North Carolina v. Alford*, 400 U.S. 25, have vitiated this Court's premise in *Jackson*. Close analysis of these cases, and the others cited by the Federal Parties in footnote 46, p. 48, *id.* clearly leads to the conclusion that *Jackson* has not been overruled by this Court and that its basic theory has since been followed

in many cases decided by this Court. See *Henry v. Warner*, 357 F.Supp. at 503, supra.

This Court made clear throughout its opinion in *Brady* that an important distinguishing fact in that case was that the defendant "was advised by competent counsel" (397 U.S. at 756). The significance of assistance of counsel where a guilty plea is made was stressed by the Court in footnote 6 at p. 748, and in distinguishing the holding of *Brady* from that in *Bram v. United States*, 168 U.S. 532. In *Brady* at p. 754 this Court pointed out that Brady had competent counsel while Bram was "alone and unrepresented by counsel".

That the requirement of assistance of counsel is crucial to the *Brady* rule is emphasized both in the majority and minority opinions in *North Carolina v. Alford*, supra. The majority opinion, 400 U.S. at 31, discussing *Brady*, points out that "the defendant was represented by competent counsel"; in his dissenting opinion at p. 39, Mr. Justice Brennan in discussing the holdings of both *Brady* and *Parker v. North Carolina*, 397 U.S. 790 (1970), referred to them as being dependent in part on the defendant being "represented by competent counsel who is aware of the threat".

In this regard it is significant to note that Article 20, which provides an accused the right to refuse summary court-martial, does not indicate that he must be provided with counsel to assist him in making the determination as to consent or objection. The Federal Parties concede in footnote 44, pp. 45-46 of their Brief, that the Navy does *not* require "that the accused must have the opportunity to consult with counsel prior to the decision", but only that he "be given time to consider his decision". Under *Brady* and *Parker*, it

would appear that there cannot be valid waiver by consent of an accused who is not advised by counsel as to the relative advantages and disadvantages of his options.

Similarly, the U.S. Court of Military Appeals enunciated its position as to "waiver" in *Culp*, 14 USCMA at 221, where Judge Ferguson stated ". . . we have resolutely refused to invoke the doctrine of waiver in those instances in which the accused has not been represented by trained counsel". (Citations).

The Federal Parties erroneously analogize at p. 47 of their Brief the position of military personnel faced with counsel-less summary court-martial to the "two-tier court system" upheld in *Colten v. Kentucky*, 407 U.S. 104. The military system does *not* provide the option of a trial at summary court and a *de novo* trial later; the enlisted man must choose between the summary or special court-martial. And contrary to the position of the defendant in *Colten*, he *does* "face the realistic threat of a prison sentence in the inferior court *without having the help of counsel*". 407 U.S. at 119. (Emphasis added).

Equally erroneous is the Federal Parties' analogy of "plea bargaining", as upheld by this Court in *Santobello v. New York*, 404 U.S. 257, to the option of the military man here being considered. This Court emphasized at p. 261 in that case that "the accused pleading guilty must be counseled, absent a waiver", and the concurring opinion of Mr. Justice Douglas at p. 265 stressed the requirement of advice of counsel in "plea bargaining" as expressed in previous decisions of this Court. In the military situation here in question, the accused is not represented by counsel in making his

choice, he does not specifically waive his right to counsel, and his option does not involve "plea bargaining" but a choice of standing trial without independent defense counsel. The latter involves a loss of a vital constitutional right; plea bargaining involves no such loss at all.

The loss of the right to counsel cannot be effectuated in the case at bar on any theory of "waiver".

V.

REQUIREMENT FOR APPOINTMENT OF COUNSEL SHOULD BE APPLIED RETROACTIVELY.

The Federal Parties, in their opening brief, argue that no right to counsel should attach to plaintiffs' summary courts-martial because, they say, such application would improperly give that right retroactive effect. As the Federal Parties view the matter, retroactivity arises here as an issue from the fact that the present case, in which plaintiffs' courts-martial had been tried in or prior to February, 1973, i.e. before the Ninth Circuit's *Daigle* opinion, was remanded by the Ninth Circuit for reconsideration in light of *Daigle*.[30]

[30]493 F.2d 1231. Presumably, the Federal Parties exclude from the issue of retroactivity those plaintiffs who may still be awaiting summary courts-martial. See Brief for Petitioners, page 5. Further, the Federal Parties do not urge that the issue of retroactivity is raised by the district court's class determination to any greater extent than by the trials of the named plaintiffs. No issue of "retroactivity" was briefed or decided below.

This question was not considered by the court of appeals, so it need not now be considered by this court. *Parker v. Levy*, 94 S. Ct. at 2564.

It is also submitted that the facts of the present case do not in fact require this Court to determine whether the right to counsel at summary courts-martial is retroactive. If, however, this Court determines that the issue of retroactivity is squarely presented and must be decided in the premises, it is urged that the principles and criteria developed by this Court to decide issues of retroactivity strongly suggest that the right to counsel at summary courts-martial should be given retroactive effect. In particular, the criteria discussed by this Court in such cases as *Stovall v. Denno*, 388 U.S. 293 (1967), *Adams v. Illinois*, 405 U.S. 278 (1972), and *Gosa v. Mayden*, 413 U.S. 665 (1973), strongly support retroactivity. Any other result would represent a distinct departure from the consistently retroactive effect given by this Court to the right of counsel at a criminal trial, which is the right here at issue. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *Berry v. City of Cincinnati*, 414 U.S. 29 (1973).

At the outset, a brief recourse to chronology may be in order. This Court decided *Argersinger*, which concluded that the right to counsel extends to all criminal prosecutions involving imprisonment, on June 12, 1972. Even prior thereto the Air Force, in recognition of the importance of the right to counsel, had provided counsel at summary courts-martial. Shortly after the decision in *Argersinger*, the Army took steps to implement that decision by providing counsel at summary courts-martial. The Navy did not

do so, despite earlier decisions by the U.S. Court of Military Appeals and other courts rather clearly indicating that the right to counsel is applicable to military as to civilian criminal prosecutions. On May 25, 1973, the Court of Military Appeals in *Alderman* held that the right to counsel as articulated in *Argersinger* was indeed applicable in military justice and shortly thereafter, by Naval message of June 8, 1973, the Navy took steps to implement *Argersinger* at its summary courts-martial.[31] The Ninth Circuit's opinion in *Daigle* was originally handed down on October 24, 1973 and amended on denial of rehearing on January 29, 1974.[32] (At the time of the *Daigle* opinion, the present case was already pending before the Ninth Circuit.)

The central purpose of this litigation, as well as of the *Alderman*, *Daigle* and *Betonie* litigation, has been to require the Navy to implement this Court's decision in *Argersinger*. It has been settled doctrine in the U.S. Court of Military Appeals for a considerable number of years that the Sixth Amendment right to counsel is applicable in military law, as it is in every other system

[31]In *Alderman*, only Judge Duncan explicitly referred to the question of retroactivity of the right to counsel there applied; he concluded, in anticipation of this Court's decision in *Berry*, that the right was retroactive. 22 U.S.C.M.A., at 306; 46 C.M.R., at 306. Since the summary court-martial there involved had been tried prior to June 12, 1972, it may be inferred that Judge Quinn implicitly agreed on this point.

[32]The Ninth Circuit's decision contains no reference to *Alderman*, despite the fact that the government in *Daigle* advised the Ninth Circuit in its Reply Brief dated March 7, 1973, that *Alderman* had been briefed and argued, p. 1, n.1.

of criminal justice in the United States. *United States v. Culp, supra; United States v. Tempia, supra.* The overwhelming weight of authority in Article III Courts is to the same effect.[33] Therefore, the doctrine that the Sixth Amendment right to counsel is preserved to American citizens in military uniform should not have come as a shock or novelty to the Navy. Since the core of the present litigation is implementation by the Navy of the right (enunciated by this Court in *Argersinger*) to counsel at petty offense criminal trials (including the Ninth Circuit's *Daigle* variant), retroactively should not even rise as a necessary issue as in criminal trials which occurred after June 12, 1972, the date of that decision. See *Tehan v. Shott*, 382 U.S. 406 (1965).[34] In the present circumstances, plaintiffs' trials did not occur until after that date.[35] Even if the right to counsel were to have no retroactive effect whatever, the right

[33]See the cases discussed in the opening Brief for Petitioners, p. 14.

[34]The Federal Parties do not explain why, if a date other than that of the *Argersinger* decision is chosen as the base date for considerations of retroactivity, the date of the Ninth Circuit's *Daigle* decision should be chosen rather than, for example, that of *Alderman*. Especially since the Court of Military Appeals is the court especially entrusted by Congress for the coherent development of military law, it would appear that the earlier date of *Alderman* would in any event be the more appropriate as the "base date".

[35]If, contrary to plaintiffs' urging, this Court were to choose the date of a decision in the premises by *this* Court as the "base date" for the relevant right, then it would not appear that retroactivity would need here be decided.

certainly should exist as of June 12, 1972 and thus be applicable to the trials of the plaintiffs.[36]

If, however, this Court concludes that the present factual context requires resolution of the issue of retroactivity, it is respectfully submitted that consideration of the criteria used by this Court in determining issues of retroactivity strongly implies that the right to counsel at trial herein (whether based on the Sixth or Fifth Amendment) should be retroactive. In particular, the issue of retroactivity of that right in the military context should be resolved in the same fashion as in the civilian context. In recognition of the extraordinary importance of counsel at criminal trials where life or liberty is at stake, this Court has consistently held that right retroactive. *Johnson v. Zerbst, supra; Pickelsimer v. Wainwright, supra; United States v. Tucker*, 404 U.S. 443.[37] Indeed, this Court has already held that *Argersinger* is retroactive. *Berry v. City of Cincinnati, supra.* Since, whatever its derivation, the right to counsel at criminal trials here involved serves the same function in the same context as the right to counsel at civilian criminal trials, the case for retroactivity is equally compelling.

[36]It should be noted that in its Naval message of June 8, 1973, the Navy appeared to concede that the right to counsel at summary courts-martial would have at least limited retroactive effect, inasmuch as that message appeared to mandate application of *Argersinger* as applied through *Alderman* to court-martial convictions then in direct review. SECNAV Msg. 082237Z/52.

[37]The fundamental nature of the right, and hence the case for retroactivity, is emphasized by this Court's statement in *Johnson* that the right to counsel has jurisdictional parameters. 304 U.S. at 486. But cf. *Gosa v. Mayden, supra.*

This Court has, in several cases, enunciated criteria which are ordinarily employed in determining the retroactivity *vel non* of new Constitutional principles. Such criteria, as stated in *Stovall v. Denno, supra*, are: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. It is respectfully urged that the right to counsel at a court-martial is so intimately connected with and vital to the accuracy of the truth-finding process at trial that the first of the above-mentioned criteria compels retroactivity without regard to the other two *Stovall* factors. In any event, however, analysis of all three *Stovall* criteria also strongly implies retroactivity.

A. *Purpose to Be Served.* This Court has repeatedly held in favor of complete retroactivity where the purpose of the rule is to overcome a deficiency of the truth-finding process at trial which casts serious question upon the accuracy of past verdicts. In such cases, this factor controls, and consideration of the other two *Stovall* criteria is unnecessary. As this Court has said:

> "We have given complete retroactive effect to the new rule, regardless of good faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. .' *Williams v. United States*, 401 U.S. 646, 653 (1971). Examples are

the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); on appeal, *Douglas v. California*, 372 U.S. 353 (1963); or at some forms of arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961)." *Adams v. Illinois*, 405 U.S. 278, at 280, 281. See also cases cited in *Williams*, n. 6, p. 653.

The right to counsel at a criminal trial is a crucially important right which breathes life into the panoply of other trial rights possessed by an accused and which vitally affects the truth-finding process. Indeed, it is within that small number of the most fundamental and most cherished rights of all. See *Argersinger*, 407 U.S., at 27, 28; *In re Oliver*, 333 U.S. 257 (1948). That right has consistently been determined retroactive by this Court. It is that right which is here at issue.

This Court has concluded that, unlike the right to counsel at trial, certain rights which do not so intimately affect the accuracy of the truth-finding process at trial are not retroactive. One example is the *Mapp* exclusionary rule involving illegal searches and seizures (*Linkletter v. Walker*, 381 U.S. 618 [1965]); that right was not considered vitally to bear on the truth-finding function of the trial but rather to deter illegal activity by law enforcement authorities. Similar considerations were involved in *Desist v. United States*, 394 U.S. 244 (1969) (electronic eavesdropping) and *Williams v. United States, supra.*

In certain other instances, the right involved only "incidental" improvement or enhancement of the reliability of the truth-finding process. Thus, the right to a jury trial, whose purpose is primarily to guard against arbitrariness and repression, *DeStefano v. Woods*, 392 U.S., at 633) is brigaded with a system of trial before a judge a mode of trial not inherently prone

to error in the truth-finding process. See *Argersinger v. Hamlin*, 407 U.S., at 29; *Gosa v. Mayden*, 413 U.S., at 679 (opinion of Justice Blackmun). Thus, also, the right to counsel at certain preliminary hearings has not been deemed retroactive, since this Court explicitly held that "the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the fact-finding process. . . ." *Adams v. Illinois*, 405 U.S., at 281. This Court noted that counsel could avail himself of "alternative procedures" to that of presence at the preliminary hearing. 405 U.S., at 282; see also *Johnson v. New Jersey*, 384 U.S., at 730. Thus, the *Adams* decision may be said to stand for the proposition that the disadvantages of the absence of the right to counsel at preliminary stages may ordinarily be "cured" by alternatives such as the independent investigation of counsel in preparation for trial or, in any event, by counsel at the trial itself. That is emphatically not true as regards the right of counsel at trial, as this Court recognized in *Adams*.

Moreover, the procedural safeguards of cases such as *Morrissey v. Brewer*, 408 U.W. 471 (1972) and *Wolff v. McDonnell*, 94 S. Ct. 2963 (1974), do not involve the function of finding innocence or guilt at a criminal trial at all. Rather, those rights pertain to informal hearings which involve the largely discretionary matters of whether, for example, parole of a convict should be revoked or some sort of administrative punishment should be visited upon prison inmates; those "findings of fact" which are involved in such determinations only coincidentally may sometimes relate to commission of crimes. By comparison, a court-martial is unequivocally

a criminal trial and determines whether the defendant has in fact committed a crime.

The right to counsel at a summary court-martial where imprisonment hangs in the balance is every bit as important to an accused as the right to counsel in petty offense trials elsewhere. One of the considerations which led to this Court's decision in *Argersinger* was the danger of "assembly line" justice, "an obsession for speedy dispositions, regardless of the fairness of the result." 407 U.S., at 34. It is respectfully submitted that, whether or not "long dockets" of summary courts-martial exist, the desire of the Government (to some degree evident in the Federal Parties' opening brief) to impose almost immediate punishment for petty offenses in summary courts-martial may similarly lead to a rush to a rush to judgment. It is difficult to see how "speedy dispositions, regardless of the fairness of the result" are likely to enhance military discipline. Punishment imposed upon a serviceman who senses that he has been fairly dealt with is likely to encourage respect for military order and discipline; punishment otherwise imposed is likely to have quite the opposite effect.[38]

Furthermore, the presence or absence of a trained prosecutor in petty offense cases is not crucial to the issue of retroactivity. In this regard, it may be recalled that *Argersinger* was not limited to cases where a trained prosecutor was present and that, further, the

[38]The purported analogy between convicts and citizens serving their country in the Armed Forces demeans the military uniform, which is a mark of honor, not of shame.

summary court-martial itself was patterned after the civilian police court. See *Senate Report No. 743*, 60th Cong., 2d Sess. (1909).

Nor is the presence of a judge who is to "assure that the interests of . . . the accused are protected" decisive. Any judge, in any court, is under a duty to assure that the accused's interests are protected. That is a far cry from affording the right to counsel of undivided loyalty which is so crucial to the fairness of a criminal trial.[39] Indeed, the inadequacy of the "assistance" of a summary court officer in uniform may be even more palpable than the corresponding inadequacy in civilian trials. As then Chief Judge Quinn, speaking for a unanimous court, said in *United States v. Fair*, 2 USCMA 521 at 528, 10 CMR 19 at 26 (1953):

> "There is a natural reluctance on the part of an enlisted man to supply details of possible wrongdoing to a superior officer. Without full knowledge of all the facts, an officer selected or appointed as counsel cannot adequately prepare a proper defense. *It is, therefore, our view that the rule (the*

[39]This aspect of the Federal Parties' argument has long been rejected by this Court:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Powell v. Alabama*, 287 U.S., at 61.

attorney-client privilege) grounded as it is in policy reasons even more sound in the military than in the civilian community, should be strictly enforced and not relaxed." (emphasis and bracketed material added.)

Thus, principles firmly established in this Court demonstrate the crucial connection between the right of counsel at trial and the accuracy of the truth-finding function and contradict the Federal Parties' assertion that "there is no reason to believe" that the absence of counsel at summary courts-martial palpably affects the truth-finding function of trial. Federal Parties' Brief, page 53.

Indeed, that the right to counsel at summary courts-martial is an important protection for the innocent is in fact borne out by the information asserted by the Federal Parties in their own brief.[40] According to their own information, the rate of complete acquittals in Navy summary courts-martial has risen by more than thirty-two percent (32%) since the Navy began to supply counsel at summary courts.[41] That is a rather significant difference.

[40]Plaintiffs do have some doubts generally as to the role of selected statistics submitted unilaterally by one party; in the premises, however, the defendants' data tends to support the plaintiffs.

[41]Federal Parties' Brief, page 26. This compares rates of complete acquittal of the periods Jan. 1-June 30, 1973 and Jan.-June 30, 1974. The actual effect of counsel may be even greater, since the initial period includes about one month of time after *Alderman* and since the data distinguishes only between convictions and complete acquittals. The data thus does not indicate the effect of counsel in effecting partial acquittals (*e.g.* where a serviceman might be acquitted of a charge of desertion, which requires an intent to remain away permanently [Article 85, U.C.M.J.] but would be convicted of the lesser-included offense of unauthorized absence [or AWOL] under Article 86, U.C.M.J.). Further, since the data supplied includes trials where the Navy did not supply counsel because the reference to trial excluded confinement, the actual effect of counsel may be greater still. Nor does the data supplied reflect the role of counsel in ameliorating the sentence where there was a conviction.

In view of the fundamental relation between the right to counsel at trial and the accuracy of the truth-finding function, it is respectfully urged that, consistent with this Court's past decisions, the right here at issue be held retroactive, without the need to examine the second and third *Stovall* criteria. Even if the latter criteria are also considered, however, the result should still be retroactivity.

B. *Justifiable Governmental Reliance.* The factor of governmental reliance is no more important in the case at bar than in those other cases which have involved the right of counsel at a criminal trial. Indeed, as a matter of history, the degree of governmental reliance would appear to be far less, since the summary court-martial trial, unlike the petty offense courts of the several states, is not an institution going back to the time of the American Revolution but was rather a creature of the nineteenth century. Further, the retention of the summary court-martial as a one-officer court by Congress in 1968 was no great reaffirmation of the wisdom or necessity for such courts.

Moreover, in view of the decisions of the Court of Military Appeals (*Culp; Tempia*) and other courts to the effect that the Sixth Amendment right to counsel

applies in military justice, it is highly questionable whether any reliance was "justifiable" after June, 1972, the date of *Argersinger*. In that regard, it should be noted that the Air Force supplied counsel at summary courts even before *Argersinger* and the Army endeavored to implement *Argersinger* soon after that decision.

C. *Effect on the Administration of Justice.* It is respectfully submitted that retroactive application of the right to counsel at summary courts-martial will hardly involve the disruptive effect upon the administration of military justice which the Federal Parties claim. Certainly, military servicemen should be protected against the "explosive effects" of prior summary court-martial convictions to the same degree as their civilian fellows. See *Berry v. City of Cincinnati, supra.*

The Federal Parties appear to emphasize the effects of a summary court-martial conviction after a serviceman returns to civilian life. Certainly, such effects may be indeed important. However, the effects upon a person who remains in the Armed Services may be equally, if not more, severe. Among the more devastating uses of a summary court conviction are its uses at a later court-martial either to escalate the maximum punishment, to increase the sentence imposed (as a matter in aggravation, MCM, 75b) or to support a finding of guilt (*United States v. Moore*, 5 U.S.C.M.A. 687, 18 C.M.R. 311 [1955]). The most devastating of these uses, under Manual for Courts-Martial, Table of Maximum Punishments, Section B (1969), is the so-called "escalator clause" whereby proof of two prior court-martial convictions (whether summary, special or

general)[42] operates to permit imposition of a bad conduct discharge which could not otherwise be imposed. Lest it be thought that this situation does not occur, it should be noted that this kind of use was in fact involved in *Alderman*.[43] It is respectfully submitted that any rule of "prospectivity" which permitted introduction of stale summary court convictions (obtained in violation of *Argersinger* requirements) at current courts-martial would indeed work a palpable hardship upon military accuseds and would be inconsistent with decisions of this Court. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972).

Further, because the United States is the employer, as well as the prosecutor, of a serviceman, and because a serviceman's service record includes records of court-martial convictions as well as evaluations of his work, the existence of a past court-martial conviction is likely to affect his evaluations, his prospects for advancement, including advancement in pay grade, and also perhaps his opportunities for re-enlistment.

Similarly, a summary court-martial conviction may have consequences for a citizen when he returns to civilian life. The most obvious, of course, is when such a conviction served as a necessary prerequisite with a

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[42]This provision, as well as the general format of the U.C.M.J., tends to belie the Federal Parties' contention that a summary court-martial trial is somehow not a criminal trial at all, but rather some sort of informal chat with "frank communication". See Federal Parties' Brief, page 19.

[43]Private Alderman was convicted of a 13-day unauthorized absence; the bad conduct discharge to which he was sentenced necessarily rested upon a prior summary court conviction.

later conviction for a punitive discharge. So too, such a conviction works evident harm when it has contributed to a discharge under other than honorable conditions.

The Federal Parties raise the spectre that retroactive application of the right to counsel at summary courts-martial could mean the reopening of any single-officer court-martial conducted since 1862.[44] In reality, however, it is less likely to disrupt the administration of criminal justice in this context than *Johnson v. Zerbst*, *Gideon*, or *Argersinger* itself.

As the Federal Parties appear to recognize (Brief, pp. 54-55), retroactivity would not place any particular burden upon the military courts, trial or appellate. Rather, petitions for relief would ordinarily be handled administratively. See Article 69, UCMJ, 10 U.S.C. Sec. 869.[45] Hence, there would be no great disruption of the workings of military courts. Furthermore, unlike the overturning of felony convictions, there would not appear to be any great need for retrials. It may be a matter of great importance to retry a person for murder or espionage. However, it is difficult to imagine why the Government would have any legitimate interest, for example, in seeking a new trial in lieu of a ten-year-old conviction for an unauthorized absence (UA)[46] of four

[44]The Navy appears to envision vast phalanxes of Methuselahs.

[45]The actual number of instances where a person would feel the effect of the conviction so as to petition for its vacation might well tend to be self-limiting. Thus, it may seriously be questioned whether ancillary forfeiture of pay would be incentive enough to cause a person to seek vacation of such a conviction. See Moyer, *Justice in the Military* 619, 620 (1972).

[46]AWOL, in Army parlance.

days' length.[47] Certainly, in such cases, the accused has already felt the full force of his sentence to confinement and has in that regard paid the "price" of the offenses charged against him (unfortunately, regardless of whether he was in fact innocent or guilty).

The Federal Parties also urge that retroactivity could reopen thousands of punishments imposed at special and general courts-martial in which prior summary court-martial convictions were introduced. MCM, Sec. 75(b). The short answer to this argument is that, while there were a number of cases decided by the Court of Military Appeals shortly after *Alderman*, there is no indication that in the ensuing period there have been any substantial number of petitions to that court, the various Courts of Military Review (or the administrative offices of the armed forces) seeking such relief.

The Federal Parties argue that it would be difficult to determine whether a past conviction in any event violated the standards of *Alderman* and *Argersinger*, to the extent that an accused must be found "indigent" and "entirely unrepresented by counsel." Normally, these matters could at least be raised by a serviceman's petition for vacation of a conviction and could be supported either by a presumption against waiver of counsel on a silent record. *Carnley v. Cochran*, 369 U.S. 506 (1962) or by his testimony or affidavit, as appropriate. See *Kitchens v. Smith*, 401 U.S. 47 (1971). As to indigency, it should first be noted that there is

[47]In any event, it should be noted that in many instances involving unauthorized absence (Article 86) or missing movement (Article 87), surviving service record entries would at least permit the government to present a prima facie case, should a retrial be desired.

substantial authority to the effect that this concept is of little relevance in the military context. See opinion of Duncan, J., in *Alderman*, 22 U.S.C.M.A., at 306.[48] In any event, it should be easy enough to determine a serviceman's wages at the time of trial, either by reference to the personal data section of the charge sheet, ordinarily part of the record of trial (*e.g.*, form DD-458) or, by reference to other documents in the records of the serviceman maintained by the Government. As to complete absence of counsel, it is respectfully urged that, in view of the Federal Parties' assertion that "few" servicemen have retained private counsel at summary courts (Brief of Federal Parties, page 14, n.14) and in view of the Navy's refusal in the past to supply defense counsel, there would be little reason to doubt the petitioner's assertions of absence of counsel in the ordinary case. In short, then, whatever the precise procedure, it would not appear unduly difficult to test prior summary court-martial convictions in the light of *Argersinger*.

It is respectfully urged that the above considerations pointing towards retroactivity are equally applicable whether the right to counsel here involved is viewed as arising from the Sixth Amendment or from the Fifth Amendment. If the right arises from the Sixth Amendment, the right is precisely that right involved in

[48]This is particularly true in the context of the summary court-martial, where only enlisted men of the four lowest pay grades may be sentenced to imprisonment. MCM, Sec. 16. In the circumstances, it seems that in the military context a serviceman's vulnerability to imprisonment at a summary court-martial is itself an appropriate index of his indigency.

Johnson v. Zerbst, *Gideon*, and *Argersinger*, and should certainly be accorded equivalent retroactivity. If the right arises from the Due Process Clause of the Fifth Amendment, the result should be no different[49] for the function and the setting of that right are nonetheless the same as those in *Johnson v. Zerbst*, *Gideon*, and *Argersinger*, namely, to provide the guiding hand of counsel at a criminal trial in order to strengthen the truth-finding function of the trial and to guard against erroneous findings, against conviction of the innocent.[50]

With respect to the Due Process right to counsel articulated by the Ninth Circuit in *Daigle*, the Federal Parties urge that retroactive application would entail greater difficulties than those of "indigency" and "absence of counsel". This arises, the Federal Parties say, because under *Daigle* each trial should be analyzed to determine whether "the charges or the material in extenuation were so complex as to make counsel necessary."[51] Plaintiffs urge that the *Daigle* limitations on right to counsel be nullified by this Court, but even if such limitations were to remain, it is suggested that these matters are in practice unlikely to be as difficult as asserted by the Federal Parties. In many cases, the

[49]This is so whether the bounds of that right coincide with those in *Argersinger* or with those in the Ninth Circuit's *Daigle* opinion.

[50]"We . . . stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson v. New Jersey*, 384 U.W., at 728.

[51]Federal Parties' brief, pp. 56, 57.

complexity of the offenses alleged will be evident from the charges and specifications themselves, which are ordinarily set out in full in the Charge Sheet attached to the record of trial (*e.g.*, form DD-458). In other cases, the petitioner may, by affidavit, or testimony, as the case may be, supply appropriate information as to defenses or matters in extenuation and mitigation which bring the case within *Daigle*. Similarly, to the extent that military exigencies may arguably provide an exception to the general right to counsel, it is respectfully submitted that in the overwhelming number of cases the data on the trial records as to when and where the trial was held will give ample demonstration of whether anything remotely approaching "military exigencies" in fact obtained.[52]

In short then, analysis demonstrates that the right to counsel at summary courts-martial should be given retroactive effect.

CONCLUSION

The order of the appellate court vacating the judgment and orders of the district court should be

[52]The Federal Parties point to extreme situations on "ships at sea or in isolated posts" (p. 35). A glance at the record of trial will tell whether a trial occurred in conditions even remotely approaching those, or, rather, occurred at a large, stationary base.

vacated, and judgment rendered affirming the judgment and orders of the district court.

January 7, 1975.

Respectfully submitted,

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